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A TREATISE
ON
FEDERAL PRACTICE IN CIVIL CAUSES

WITH SPECIAL REFERENCE TO

PATENT CASES AND THE FORECLOSURE
OF RAILWAY MORTGAGES.

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The Memory of my Father,

DWIGHT FOSTER,

FORMERLY JUSTICE OF THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS,

I DEDICATE THIS BOOK,

BEGUN AT HIS SUGGESTION,
ALTHOUGH HE DID NOT LIVE TO CORRECT ITS FAULTS.

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PREFACE TO SECOND EDITION.

THE passage of the Evarts Act creating the Circuit Courts of Appeals, which radically changed the jurisdiction and practice affecting appeals and writs of error, and the many recent decisions explaining the right to and practice in removals from the State to the Federal courts, have rendered a second edition necessary. The reception given by the bench and bar to the first edition has encouraged the author to enlarge the scope, and he hopes the usefulness of the book. Many of the original sections have been rewritten, and new sections have been added to the original chapters, including all material statutes and decisions passed or reported before the October term of 1891, and many decisions since that date which have been added while the book was in the press.

New chapters have been added, on Practice in Admiralty, by Charles C. Burlingham, Esq., of the New York bar: Practice in the Court of Private Land Claims, by ex-Judge E. A. Bowers, now of the bar of Washington, D. C.; and Practice in the Court of Claims. The chapters on Jurisdiction, Evidence, Costs, Practice at Common Law, Removal of Causes, and Writs of Error and Appeals, have been entirely rewritten and nearly doubled in size. A large number of forms and rules, and a few recent statutes

have been added to the Appendix. It is hoped that the book will now serve as a full guide to the practitioner in every branch of Federal practice in civil causes.

The author has been greatly aided by the Notes to the Revised Statutes by Messrs. Gould and Tucker, and by the Important Federal Statutes Annotated, by Mr. Russell H. Curtis.

The references to the Supplement to the Revised Statutes are to the first edition.

NEW YORK, January 11, 1892.

PREFACE TO THE FIRST EDITION.

THE object of this work is to furnish a guide to the whole field of practice in the Federal Courts, except in cases of admiralty, criminal prosecutions, and before the Court of Claims; including references to all the statutes and the principal decisions upon the subject. Greater space has been given to practice in equity on account of its importance and obscurity. The chapter on the practice on Writs of Error and Appeals is not intended as more than a summary which may be of convenience to the practitioner. The practice in the Supreme Court of the United States cannot be adequately described in less than at least one volume. The author has used with great freedom many treatises on chancery pleadings and practice, and collections of annotations upon statutes of the United States. Besides the great work of Lord Redesdale, he is especially indebted for assistance to Daniell's Chancery Practice, with the notes of successive editors, including those of Chancellor Cooper; Bump's annotations of the statutes regulating Federal Procedure; and the manuscript lectures on equity pleading delivered before the Law School of Boston University, by the late Judge Dwight Foster. The citations from Daniell are taken from the second and fifth American editions. The writer is aware that both these editions contain many

rules of modern English chancery practice which are not binding upon the courts of the United States; but he has been careful to exclude all such from this work. The fact that these later editions are more accessible to the profession is his reason for referring to them rather than to the first American edition. He has received great assistance and encouragement from many members of the bench and bar; especially from his teachers, Professor Theodore W. Dwight and ex-Judge John F. Dillon, and from John A. Shields, Esq., the Clerk of the Circuit Court of the United States for the Southern District of New York, who has very kindly examined and approved the chapter on Costs.

He is fully conscious that the book contains many errors and omissions. The pressing need of a treatise upon the subject is his only excuse for the publication of so imperfect a work. And he will welcome any criticism, whether public or private, which will show him how, in a subsequent edition, to make it more useful to the profession.

NEW YORK,

August 31, 1889.

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FEDERAL EQUITY PRACTICE.

CHAPTER I.

JURISDICTION.

§ 1. **Equitable Jurisdiction in General.** — Equity is that system of jurisprudence which was administered by the High Court of Chancery of England in the exercise of its extraordinary jurisdiction,¹ and which has been amplified and extended by the more modern decisions of the English and American courts. It owed its origin to a desire upon the part of the English sovereigns and their chancellors to supplement the deficiencies and soften the rigors of the common law ; and whereas the well-springs of this were such of the customs of the German tribes as had been brought with them from their Fatherland by the Jutes and Angles ;² those of that, which was administered at first exclusively by ecclesiastics, are in the canon, which was itself derived from the greatest monument of the genius of ancient Rome, the civil law.³ Since the time of Nottingham, before whom each succeeding chancellor had decided the cases brought before him in accordance with his own notions of what was proper, or in the language of Selden,⁴ measured justice out by the length of his foot, the same respect has been paid to precedent in the courts of equity and common law. But the rules regulating the remedies administered by the former are much more plastic. And even at the present time cases often occur where judges sitting at equity, with the approval and assistance of the profession, invent and adopt new remedies suited to a state of society and of civilization unknown and not anticipated when the procedure in chancery first assumed the form that

§ 1. ¹ Mitford's Pleadings; Bispham's Equity, § 1.

² Holmes' Com. Law.

³ Langdell's Equity Pleading, Introduction.

⁴ Selden's Table Talk, Title *Equity*.

it still substantially retains.⁵ The chronicles of the growth and development of equity abound with names well known to the students, as well of general history as of jurisprudence. Among them Wolsey, More, Bacon, Clarendon, Somers, and Erskine are the most familiar to the former, while the members of the profession look back with especial admiration upon the careers of Nottingham, Hardwicke, Eldon, Westbury, Kent, Story, and Taney. Although originally no one could seek their aid who was not denied justice by the courts of common law; yet after he had once shown a title to their assistance, courts of equity would almost always give a suitor complete relief in the matter about which he complained.⁶ And now that since the time of Mansfield the courts of common law have, abandoning their former jealousy, in many instances of their own accord as well as under the compulsion of statutes, accepted doctrines first created by courts of equity,⁷ the latter have not felt obliged to relinquish the jurisdiction which they formerly acquired.⁸ One of the marked characteristics which distinguish equity from the common law, is that, while the latter, as a general rule, acts against and exercises control over property alone; has but a very limited and merely incidental power, mostly borrowed from chancery, to enforce obedience to a personal command, its procedure being founded upon the theory that the parties to an action owe no obedience to the court;⁹ and is consequently restricted in its operation when the property which is the subject of a contention is beyond the reach of its process: equity acts directly against and exercises complete control over persons, and does not lose jurisdiction when the parties are subject to its process, because the property over which it thereby assumes control is beyond the territory under those laws whence its own power is derived.¹⁰

⁵ *Kennedy v. St. Paul & Pacific Railroad Company*, 2 Dillon, 448; *Wallace v. Loomis*, 97 U. S. 146; *Joy v. St. Louis*, 138 U. S. 1, 50.

⁶ 1 Fonblanque's *Equity*, b. i. chap. i. § 3, *note* (f); *Motteux v. The London Assurance Co.*, 1 Atk. 545; *Tayloe v. The Merchants' Fire Ins. Co.*, 9 How. 390, 405.

⁷ *Moses v. Macferlan*, 2 Burrow, 1005; *Dickerson v. Colgrove*, 100 U. S. 578.

⁸ *Putnam v. New Albany*, 4 Bissell, 365.

⁹ Langdell's *Eq. Pl.* § 40.

¹⁰ *Archer v. Preston*, 1 Eq. Cas. Ab. 133, pl. 3, cited and followed in *Arglasse v. Muschamp*, 1 Vernon, 75; s. c. 1 Vernon, 135; *Penn v. Lord Baltimore*, 1 Vesey Sr. 414; *Massie v. Watts*, 6 Cranch, 148; *Muller v. Dows*, 94 U. S. 444, at pages 449-450. The authorities are well collected in a learned opinion by Judge, subsequently Chief Judge, Henry E. Davies, in *Gardner v. Ogden*, 22 N. Y. 327. Cf. *Carpenter v. Strange*, 141 U. S. 87, 106; cited *infra*, § 325.

§ 2. General Survey of the Jurisdiction of Courts of Equity. —

The jurisdiction of courts of equity is exercised either for the protection of rights which the common law does not recognize: or for the prevention or redress of wrongs for which the common law affords no adequate remedy. A full consideration of this topic is beyond the scope of this treatise. The following summary, although imperfect, may occasionally assist the reader. The rights which a court of equity alone respects are: the rights of beneficiaries under a trust,¹ either express or implied, — which latter term includes those which are resulting² or constructive:³ the right to be relieved from an obligation which has been entered into, or to recover a right which has been lost by accident, — which expression is said to include the cases where one has become subject to a penalty or forfeiture,⁴ or has lost a document the possession of which was essential to his success in a legal action,⁵ and is also often used to bolster up a weak equity of another kind — ;⁶ by mistake, — which must be mutual, material, and not caused by the negligence of the party seeking relief,⁷ and which, if solely of a point of law, will very rarely release one from his contract obligations — ;⁸ by fraud, whether actual⁹ or constructive;¹⁰ or by duress:¹¹ and the rights of those who are justly entitled to compel election under a will, or an adjustment of

§ 2. ¹ *Sturt v. Mellish*, 2 Atk. 610; *New Orleans v. Morris*, 105 U. S. 600.

² *Dyer v. Dyer*, 2 Cox Eq. Cas. 92; *Hoxie v. Carr*, 1 Sumner, 187.

³ *National Bank v. Insurance Co.*, 104 U. S. 54, 64-71.

⁴ 1 *Spence Eq.* 629, 630; *Bispham's Eq.* § 178. Mortgages are included under this head, *Mitford's Pl.* 118-276; *Story's Eq. Jur.* § 89.

⁵ *Savannah National Bank v. Haskins*, 101 Mass. 370; *Donaldson v. Williams*, 50 Mo. 408; *Story's Eq. Jur.* § 84; *Bispham's Eq.* §§ 176, 177.

⁶ *Story's Eq. Jur.* §§ 90-99; *Bispham's Eq.* §§ 182, 183. Cases where this head of equity is invoked for relief against a defective execution of a power are included here.

⁷ *Bispham's Eq.* § 191; *Whittemore v. Farrington*, 76 N. Y. 452; *McFerran v. Taylor*, 3 Cranch, 281; *Elliott v. Sackett*, 108 U. S. 132; *Duke of Beaufort v. Neeld*, 12 Clark & Finnelly, 248, at

page 286; *Stephenson v. Wilson*, 2 Vern. 325.

⁸ *Hunt v. Rousmanier's Admrs.*, 8 Wheaton, 174, 215; s. c. 1 *Peters*, 1, 14; *Snell v. Insurance Company*, 98 U. S. 85; *Pitcher v. Hennessey*, 48 N. Y. 415; *Adair v. Brimmer*, 74 N. Y. 539; *Relief Fire Insurance Co. v. Shaw*, 94 U. S. 574; *Allen v. Galloway*, 30 Fed. R. 466; *Cooper v. Phibbs*, L. R. 2 H. L. 170; *Elliott v. Sackett*, 108 U. S. 132, 142.

⁹ *Cobbeltiom v. William*, Chan. Cal. II.; *Stonehouse v. Starishaw*, Chan. Cal. XXIX.; *Bief v. Dyer*, Chan. Cal. XI; *Bacon v. Bronson*, 7 Johns. Ch. (N. Y.) 194; *Jones v. Bolles*, 9 Wall. 364.

¹⁰ *Mackreth v. Fox*, 4 Bro. P. C. 258; *Ex parte Lacey*, 6 Ves. 625; *Villa v. Rodriguez*, 12 Wall. 323, 339.

¹¹ *Nicholls v. Nicholls*, 1 Atk. 409; *Gould v. Okeden*, 4 Bro. P. C. 198; *Baker v. Morton*, 12 Wall. 150.

liabilities,¹²—under which term are included set-off,¹³ contribution,¹⁴ exoneration,¹⁵ and marshalling of securities.¹⁶ The cases where the jurisdiction of equity is exercised merely for the sake of the remedy are where its interposition is needed to assist in obtaining a judgment at law by compelling a discovery from a defendant,¹⁷ or the perpetuation of the testimony of witnesses,¹⁸ or their examination abroad,¹⁹ when it is feared that, on account of death, illness, or absence, they cannot be obliged to attend upon the trial; to satisfy a judgment out of property of a debtor which cannot be reached by an execution;²⁰ to prevent a threatened breach of a right,²¹ or compel the performance of a duty,²² the commission or omission of which, respectively, would inflict such an irreparable injury upon a person, that a judgment for damages, or the cumbrous legal process of ejectment, replevin, detinue, or account render, would be no adequate remedy for the loss thereby occasioned; to prevent a needless multiplicity of suits;²³ and to compel the cancellation or execution of instruments,²⁴ the existence or want of which is a cloud upon, or an apparent flaw in a person's title, or would render it difficult for him to resist an unjust demand, or to dispose of property by sale.

§ 3. **Constitutional Provisions affecting the Jurisdiction of the Federal Courts.**—The Constitution of the United States provides that, “The judicial power” of the United States “shall extend to

¹² *Arnold v. Kempstead*, 1 Ambler, 466; *Jones v. Collier*, 2 Ambler, 730; *Herbert v. Wren*, 7 Cranch, 370, 378.

¹³ *Chapman v. Derby*, 2 Vern. 117; *Lord Lanesborough v. Jones*, 1 P. Wms. 325; 2 Story's Equity Jurisprudence, § 1433; *Story, J.*, in *Greene v. Darling*, 5 Mason, 201, 207–213.

¹⁴ *Layer v. Nelson*, 1 Vern. 156; *Howards v. Selden*, 5 Federal Reporter, 465, 473.

¹⁵ *Galton v. Hancock*, 2 Atk. 425; *Walker v. Jackson*, 2 Atk. 625; *Bank of U. S. v. Beverly*, 1 How. 134, 151.

¹⁶ *Aldrich v. Cooper*, 8 Ves. 394; *Trimmer v. Bayne*, 9 Ves. 209; 1 Story's Eq. Jur. § 633.

¹⁷ *Finch v. Finch*, 2 Ves. Sr. 492; *Moodalay v. Morton*, 1 Bro. C. C. 469; *Brown v. Swann*, 10 Pet. 497, 500; *Heath v. Erie Ry.*, 9 Blatchf. 316.

¹⁸ *Earl of Suffolk v. Green*, 1 Atk. 450; *Pearson v. Ward*, 1 Cox Eq. 177; *Lord*

Dursley v. Berkeley, 6 Ves. 251. See U. S. Rev. Stat. §§ 863–867.

¹⁹ *Moodalay v. Morton*, 1 Bro. C. C. 469.

²⁰ *Angell v. Draper*, 1 Vern. 399; *Scottish American Mortgage Co. v. Follansbee*, 14 Fed. R. 125.

²¹ *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Osborn v. Bank of the United States*, 9 Wheat. 738.

²² *Stribley v. Hawkie*, 3 Atk. 275; *Huguenin v. Baseley*, 15 Ves. 180; *Hunt v. Rousmanier's Admrs.*, 1 Pet. 1; *Willard v. Tayloe*, 8 Wall. 557.

²³ *Freeman v. Pontrell*, Chan. Cal. XIII.; *Earl of Bath v. Sherwin*, 4 Bro. P. C. 373; *Woods v. Monroe*, 17 Mich. 238; *Cummings v. National Bank*, 101 U. S. 153; *Dodge v. Briggs*, 27 Fed. R. 161.

²⁴ *Pierce v. Webb & Stalker*, note to *Ryan v. Mackmath*, 3 Bro. C. C. 15; *Peake v. Highfield*, 1 Russ. 559, and cases cited; *Bunce v. Gallagher*, 5 Blatchf. C. C. 481; *Boyce v. Grundy*, 3 Pet. 210.

all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of Admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States; and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."¹ But "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."² "In all cases affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction,"³ although "such inferior Courts as the Congress may from time to time ordain and establish"⁴ may also have original jurisdiction thereof.⁵ "In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make."⁶ In no other cases can it have original jurisdiction.⁷

§ 4. **The Distinction between Law and Equity in the Federal Courts.** — The fact that those who framed the Constitution thought it necessary to separately mention law and equity, when blocking out the jurisdiction of the Federal courts, has caused many judges to think, and even to say in their opinions, that it was thereby evidently intended that these branches of the law should always be kept apart.¹ The better opinion, however,

§ 3. ¹ The Constitution, art. iii. § 2.

² Eleventh Amendment to the Constitution.

³ The Constitution, art. iii. § 2.

⁴ *Ib.* § 1.

⁵ *Ames v. Kansas*, 111 U. S. 449; *Börs v. Preston*, 111 U. S. 252; *United States v. Ravara*, 2 Dallas, 297; *Gittings v. Crawford*, Taney's Decisions, 1; *St. Luke's Hospital v. Barclay*, 3 Blatchf. 259; *Graham v. Stucken*, 4 Blatchf. 50.

⁶ The Constitution, art. iii. § 2.

⁷ *Marbury v. Madison*, 1 Cranch. 137; *Ex parte Vallandigham*, 1 Wall. 243.

§ 4. ¹ *Parsons v. Bedford*, 3 Pet. 433; *Bennett v. Butterworth*, 11 How. 669, 674; *Hipp v. Babin*, 19 How. 271, at page 277; *Fenn v. Holme*, 21 How. 481, 486; *Costs in Civil Cases*, 1 Blatchf. C. C. 652, 654; *Butler v. Young*, 1 Flippin, 276, 278; *Meade v. Beale*, Taney, 339, at page 361; *Thompson v. Railroad Companies*, 6 Wall. 134; *Reubens v. Joel*, 13 N. Y. 488, at page 497.

seems to be that this distinction between law and equity is enforced by the Constitution only to the extent to which the Seventh Amendment forbids any infringement of the right of trial by jury, as fixed by the common law.² Yet, although a great number of the States of the American Union, and even England itself, has fused together the two systems, in the courts of the United States, while the same judges have jurisdiction in each, the common law and equity are still as distinct as they were in the time of Coke and Bacon.

§ 5. **General Rules affecting the Jurisdiction in Equity of the Federal Courts.** — The jurisdiction in equity of the Federal courts is, subject to the limitations of the Constitution, substantially the same as that of the English Court of Chancery;¹ although, in the absence of special statutory authority, they do not exercise those powers not judicial which were exercised over the persons and estates of infants, idiots, lunatics, and charities by the Lord Chancellor, as the representative of the sovereign and by virtue of the latter's prerogative as *parens patrie*.² It was said by Chief Justice Taney that the Constitution of the United States grants only judicial power at law and in equity to its courts; that is, powers at that time understood and exercised as judicial, in the courts of common law and equity in England. "And it must be construed according to the meaning which the words used conveyed at the time of its adoption: and the grant of power cannot be enlarged by resorting to a jurisdiction which the Court of Chancery in England, centuries ago, may have claimed as a part of its ordinary judicial power, but which had been abandoned and repudiated as untenable on that ground, by the court itself, long before the Constitution was adopted."³ The same judge also said that it was undoubtedly true, in regard to equitable rights, that the power of the courts of chancery of the United States is, under the Con-

² Mr. Justice Matthews in *Root v. Railway Co.*, 105 U. S. 189, 206. Compare *Ex parte Boyd*, 105 U. S. 647.

§ 5. ¹ *Robinson v. Campbell*, 3 Wheat. 212, at page 224; *Fenn v. Holme*, 21 How. 481, at page 484; *Meade v. Beale*, Taney, 339, at page 361; *Gordon v. Hobart*, 2 Sumner, 401, at page 405; *Fletcher v. Morey*, 2 Story, 555, at page 567; *Root v. Railway Company*, 105 U. S. 189, at page 207.

² *Fontain v. Ravenel*, 17 How. 369, at page 391; *Loring v. Marsh*, 2 Clifford, 469, at page 492; *In re Barry*, 42 Fed. R. 113; *In re Burrus*, Petitioner, 136 U. S. 586. But see the *Late Corporation of The Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1, 51, 56; s. c. 140 U. S. 665.

³ Chief Justice Taney in *Fontain v. Ravenel*, 17 How. 330, 394, 395.

stitution, to be regulated by the law of the English chancery; that is to say, the distinction between law and equity as recognized in the jurisprudence of England is to be observed in the courts of the United States, in administering the remedy for an existing right. The rule applies to the remedy and not the right; and it does not follow that every right given by the English law, and which at the time the Constitution was adopted might have been enforced in the Court of Chancery, can also be enforced in a court of the United States; the right must be given by the law of the State or of the United States.⁴ The Revised Statutes of the United States provide that: "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law."⁵ The Supreme Court has construed this statute substantially as follows: The effect of the provision of the Judiciary Act is that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.⁶ "This enactment certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts."⁷ "It would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class."⁸ Accordingly, a suit in equity to enforce a legal right can be brought only when the court can

⁴ *Meade v. Beale*, Taney, 339, 361.

⁵ U. S. R. S. § 723.

⁶ *Hipp v. Babin*, 19 How. 271; *Insurance Co. v. Bailey*, 13 Wall. 616, 621; *Grand Chute v. Winegar*, 15 Wall. 373, 375; *Lewis v. Cocks*, 23 Wall. 466, 470; *Root v. Railway Co.* 105 U. S. 189,

212; *Killian v. Ebbinghus*, 110 U. S. 568, 573.

⁷ *N. Y. Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205, 214, *per* Bradley, J.

⁸ *Whitehead v. Shattuck*, 138 U. S. 146, 151; *per* Mr. Justice Field.

give more complete and effectual relief in kind or in degree on the equity side than on the common-law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not recoverable at law, as in *Watson v. Sutherland*, 5 Wall. 74; or where an agreement procured by fraud is of a continuing nature, and its rescission will prevent a multiplicity of suits."⁹ "By inadequacy of the remedy at law is here meant, not that it fails to produce the money, — that is a very usual result in the use of all remedies, — but that in its nature or character it is not fitted or adapted to the end in view."¹⁰ There may consequently be cases over which the English courts of chancery would have taken jurisdiction, which are not cognizable by the Federal courts when sitting at equity.¹¹

"The adequate remedy at law which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Congress."¹² Whether the equitable jurisdiction is lost when a statute of the United States gives the same or adequate relief at law, — as, for example, in the case of discovery, — has not yet been settled.¹³ If a statute of the United States creates a new right, the remedy will be in equity if the relief thereby afforded is in analogy with a species of relief ordinarily given by equity alone.¹⁴ Thus, it has been held that a suit to enforce the individual liability of stockholders or directors to creditors of a corporation,¹⁵ or to determine the question of the right of possession to land under § 2326 of the Revised Statutes when there are conflicting claims to patents before a land office,¹⁶ must be brought in equity. A suit under § 5239 of the Revised

⁹ *Buzard v. Houston*, 119 U. S. 347, 351, 352; *per* Gray, J.

¹⁰ *Thompson v. Allen County*, 115 U. S. 550, 554; *per* Miller, J.

¹¹ *Buzard v. Houston*, 119 U. S. 347, 352.

¹² *McConihay v. Wright*, 121 U. S. 201, 206; *per* Matthews, J.

¹³ Compare *Vaughan v. Central Pacific R. R. Co.*, 4 Sawyer, 280; *Pratt v. Northam*, 5 Mason, 95; *Peters v. Prevost*, 1 Paine, 64; *Home Ins. Co. v. Stanchfield*, 1 Dill. 424; *Markey v. Mut. Ben. Life Ins. Co.*, 6 Ins. L. J. 537; *Heath v. Erie Railroad Co.*, 9 Blatchf. 316; *Drexel v.*

Berney, 14 Fed. R. 268; *Post v. Toledo, C. & C. R. R. Co.*, 144 Mass. 341; 4 New England Rep. 221.

¹⁴ *Edgell v. Haywood*, 3 Atk. 354; *Hornor v. Henning*, 93 U. S. 228; *Terry v. Little*, 101 U. S. 216; *Manufacturing Co. v. Bradley*, 105 U. S. 175; *Doe v. Waterloo Min. Co.*, 43 Fed. R. 219.

¹⁵ *Hornor v. Henning*, 93 U. S. 228; *Terry v. Little*, 101 U. S. 216; *Manufacturing Co. v. Bradley*, 105 U. S. 175; *Stone v. Chisolm*, 113 U. S. 302.

¹⁶ *Doe v. Waterloo Min. Co.*, 43 Fed. R. 219.

Statutes to recover of a director of a national bank the damages sustained in consequence of excessive loans should be brought on the common-law side of the court.¹⁷

§ 6. **State Statutes cannot impair the Jurisdiction nor regulate the Practice of Federal Courts of Equity.**—No State statute giving one of its courts—for example, a court of probate—exclusive jurisdiction of a certain class of litigation can impair the jurisdiction of the Federal courts.¹ No State statute enlarging the powers of courts of common law can impair the jurisdiction of a Federal court of equity.² No State statute diminishing or destroying an equitable remedy, or in any way regulating the practice in courts of equity, can have any effect upon the jurisdiction or practice of the Federal courts.³ Such are statutes requiring a mortgagor to tender the debt secured by his mortgage before filing a bill to redeem the mortgaged premises;⁴ requiring a bill to foreclose a mortgage given to secure a judgment to show that execution has been issued under the judgment and returned unsatisfied;⁵ requiring leave to be obtained from a State court before a suit can be brought to enforce a judgment therein entered,⁶ or the presentation of a claim to the comptroller before a suit can be brought against a city;⁷ requiring a bond to be given before an injunction can be granted;⁸ or regulating the form of the security then required or the proceedings to enforce the same;⁹ authorizing persons to agree upon a statement of facts, and to stipulate that the court take jurisdiction to try a cause and render a decree without pleadings;¹⁰ authorizing the examination of a party before trial;¹¹ providing that a county can only be sued in a specified State court;¹² forbidding a foreign corporation to

¹⁷ *Stephens v. Overstolz*, 43 Fed. R. 771.

§ 6. ¹ *Suydam v. Broadnax*, 14 Pet. 67; *Hull v. Dills*, 19 Fed. R. 657.

² *McConihay v. Wright*, 121 U. S. 201, 206; and cases cited.

³ *Boyle v. Zacharie*, 6 Pet. 648; *Bein v. Heath*, 12 How. (U. S.) 168, 179; *Noonan v. Lee*, 2 Black, 499, 509; *Thompson v. Railroad Companies*, 6 Wall. 134; *Cowles v. Mercer County*, 7 Wall. 118; *Payne v. Hook*, 7 Wall. 425; *Railway Company v. Whitton's Administrator*, 13 Wall. 270, 285; *Smith v. Railroad Company*, 99 U. S. 398.

⁴ *Gordon v. Hobart*, 2 Sumner, 401.

⁵ *Dow v. Chamberlin*, 5 McLean, 281.

⁶ *Phelps v. O'Brien County*, 2 Dill. 518.

⁷ *Gamewell Fire Alarm Tel. Co. v. Mayor, &c.* 31 Fed. R. 312.

⁸ *Bein v. Heath*, 12 How. (U. S.) 168, 178.

⁹ *Bein v. Heath*, 12 How. (U. S.) 168; *Russell v. Farley*, 105 U. S. 437; *Meyers v. Block*, 120 U. S. 206, 211.

¹⁰ *Nickerson v. Atchison, T., & Santa Fe R. R. Co.*, 1 McCrary, 383.

¹¹ *Dravo v. Fabel*, 132 U. S. 487.

¹² *Cowles v. Mercer County*, 7 Wall. 118; *Lincoln County v. Luning*, 133 U. S. 529.

sue until it has complied with a statutory condition;¹³ and, at least when the suit is brought in a district not including the State that passed the statute, one that permits a debtor to file a bill to compel the return or cancellation of securities for a usurious debt, without payment or the offer of payment of the amount borrowed with lawful interest.¹⁴

§ 7. **State Laws creating new Rights are enforced by Federal Courts of Equity.**—If, however, the customary¹ or statute² law of a State has created a new right, the Federal courts will enforce the same at law or equity, if it falls within the remedies authorized by either branch of their jurisdiction. Such are statutes giving a mortgagor or his judgment creditors a certain time within which to redeem land after a foreclosure sale;³ authorizing a suit to set aside the probate of a will, or a will itself, for fraud;⁴ authorizing a person in possession of land, and unmolested,⁵ or even one out of possession of vacant land,⁶ to sustain a bill to determine and quiet the title to the same; but not a State statute authorizing one out of possession of land to obtain possession of the same when occupied by another through a suit triable without a jury;⁷ imposing on stockholders individual liability to the creditors of their corporations;⁸ making an assessment for opening streets a lien upon abutting lands, which can be foreclosed by the city or its assignee;⁹ authorizing the appointment of a receiver under certain conditions, which in the Federal courts must then also be performed;¹⁰ authorizing a bill for a partition of an equitable claim to land the legal title to which is in the

¹³ *Bank of British North America v. Barling*, 44 Fed. R. 641.

¹⁴ *Matthews v. Warner*, 6 Fed. R. 461, 465; affirmed without passing on this point, 112 U. S. 600.

§ 7. ¹ *Neves v. Scott*, 13 How. 268, 271; *Gaines v. Fuentes*, 92 U. S. 10, 20; *Ellis v. Davis*, 109 U. S. 485; *Lorman v. Clarke*, 2 McLean, 568, 577; *Nichols v. Eaton*, 91 U. S. 716, 729.

² *Clark v. Smith*, 13 Pet. 195; *Fitch v. Creighton*, 24 How. (U. S.) 159; *Brine v. Insurance Company*, 96 U. S. 627; *Mills v. Scott*, 99 U. S. 25; *Van Norden v. Morton*, 99 U. S. 378; *Cummings v. National Bank*, 101 U. S. 153, 157; *Holland v. Challen*, 110 U. S. 15; *Reynolds*

v. Crawfordsville First National Bank, 112 U. S. 405.

³ *Brine v. Insurance Company*, 96 U. S. 627; *Orvis v. Powell*, 98 U. S. 176, 178; *Connecticut Mutual Life Insurance Company v. Cushman*, 108 U. S. 51.

⁴ *Broderick's Will*, 21 Wall. 503, 519, 520.

⁵ *Clark v. Smith*, 13 Pet. 195.

⁶ *Holland v. Challen*, 110 U. S. 15.

⁷ *Whitehead v. Shattuck*, 138 U. S. 146.

⁸ *Borland v. Haven*, 37 Fed. R. 394.

⁹ *Fitch v. Creighton*, 24 How. (U. S.) 159.

¹⁰ *Flash v. Wilkerson*, 22 Fed. R. 689; *Fechheimer v. Baum*, 37 Fed. R. 167; *T. & W. M. Co. v. Shatto*, 34 Fed. R. 380. But see *Scott v. Neely*, 140 U. S. 106.

United States;¹¹ authorizing an injunction to be granted in a new class of cases;¹² empowering a guardian with the permission of the State court to mortgage his ward's estate, but not clauses providing that such a mortgage can only be foreclosed in the court which authorized its execution;¹³ creating and providing for the enforcement of a mechanic's lien;¹⁴ and authorizing a court of equity after the destruction of the public records to enter a decree establishing and confirming the title of a landowner.¹⁵ A State statute cannot give a Federal court jurisdiction in equity of a case in which there is an adequate remedy at law.¹⁶ Thus, a State statute cannot authorize a bill in equity in a Federal court to obtain possession of land held adversely to the complainant;¹⁷ or a creditor's bill by a complainant who has not obtained a judgment upon his claim.¹⁸ Whether a mortgagee must sue at law or in equity to recover from one who by a covenant with the mortgagor has assumed the mortgage, when the suit is brought in the District of Columbia, depends upon the law of the forum, not on the law of the place where the deed and mortgage were made, and the land situated.¹⁹ When a State statute creating a new liability provides a special remedy, such liability can be enforced in the Federal courts in no other manner.²⁰ When a State statute creates a new liability and provides that it can only be enforced in a specified State tribunal, the Federal courts will enforce the liability, and reject the clause respecting the exclusive jurisdiction.²¹

§ 8. State Statutes of Limitation. — Federal courts of equity usually follow by analogy State statutes of limitation,¹ especially in foreclosure suits² and suits against executors and adminis-

¹¹ *Aspen Mining & Smelting Co. v. Rucker*, 28 Fed. R. 220.

¹² *Cummings v. National Bank*, 101 U. S. 153, 157; *Lanier v. Alison*, 31 Fed. R. 100.

¹³ *Davis v. James*, 2 Fed. R. 618.

¹⁴ *Idaho & Oregon Land Improvement Co. v. Bradbury*, 132 U. S. 509.

¹⁵ *Gormley v. Clark*, 134 U. S. 338.

¹⁶ *Whitehead v. Shattuck*, 138 U. S. 146; *Scott v. Neely*, 140 U. S. 106.

¹⁷ *Whitehead v. Shattuck*, 138 U. S. 146.

¹⁸ *Scott v. Neely*, 140 U. S. 106.

¹⁹ *Willard v. Wood*, 135 U. S. 309, 313.

²⁰ *Fourth National Bank v. Francklyn*, 120 U. S. 747; *Flour City Nat. Bank v. Wechselberg*, 45 Fed. R. 547.

²¹ *Davis v. James*, 2 Fed. R. 618.

§ 8. ¹ *Wagner v. Baird*, 7 How. 234, 258; *Broderick's Will*, 21 Wall. 503; *Godden v. Kimmell*, 99 U. S. 201; *Meath v. Phillips County*, 108 U. S. 553; *Kirby v. L. S. & M. S. R. R.*, 120 U. S. 130; *Pratt v. Northam*, 5 Mason, 95, 112; *per Story, J.*; *Norris v. Haggin*, 136 U. S. 386.

² *Cleveland Insurance Company v. Reed*, 1 Biss. 180; *Reeves v. Vinacke*, 1 McCrary, 213, 217; *per Nelson and Dillon, JJ.*

trators;³ but, at least when their jurisdiction is not concurrent with courts of law,⁴ they do not consider themselves bound by such statutes.⁵ It has been said that a Federal court of equity will never follow a State statute of limitation when thereby manifest wrong and injustice would be wrought.⁶ A State statute of limitation cannot bar the United States.⁷ The rule that a State is not affected by laches or a statute of limitation cannot aid a creditor of a State when suing one of its debtors.⁸ Otherwise the courts of the United States in actions at common law not founded upon Federal statutes, are bound by State statutes of limitation.⁹ The effect of such a statute upon actions at common law to enforce rights created by Federal statutes, such as patents and copyrights, has been the subject of conflicting adjudications.¹⁰

§ 9. **Property in the Custody of a State Court.** — A court of the United States, through a spirit of judicial comity, will usually refuse to interfere with property in the custody of a State court.¹

³ *Pulliam v. Pulliam*, 10 Fed. R. 53; *Broderick's Will*, 21 Wall. 503.

⁴ *Wagner v. Baird*, 7 How. 234, 258; *Godden v. Kimmell*, 99 U. S. 201.

⁵ *Kirby v. L. S. & M. S. R. R.*, 120 U. S. 130, 137; *Etting v. Marx's Executor*, 4 Fed. R. 673; *Stevens v. Sharp*, 6 Sawyer, 993.

⁶ *Fogg v. St. Louis, H. & K. R. R. Co.*, 17 Fed. R. 871, 873; *Story's Eq. Jur.* § 1521.

⁷ *United States v. Thompson*, 98 U. S. 486; *United States v. Nashville, C. & St. L. Ry. Co.*, 118 U. S. 120; *United States v. Beebe*, 127 U. S. 338; *United States v. Insley*, 130 U. S. 263; *United States v. Wallamet & C. M. Wagon Road Co.*, 42 Fed. R. 351.

⁸ *Cressey v. Meyer*, 138 U. S. 525.

⁹ U. S. R. S. § 721; *McCluney v. Silliman*, 3 Pet. 270; *Amy v. Dubuque*, 98 U. S. 470.

¹⁰ That they do not affect such actions was held in *Collins v. Peebles*, 2 Fisher's Pat. Cas. 541, *per* Mr. Justice Swayne; *Parker v. Hallock*, 2 Fisher's Pat. Cas. 543, *n.*, *per* Mr. Justice Grier; *Read v. Miller*, 2 Biss. 12, *per* McDonald, J.; *Wetherill v. New Jersey Zinc Co.*, 1 Ban. & A. 485, 490, *per* McKennan, J.; *Anthony v. Carroll*, 2 Ban. & A. 195, 197, *per* Shepley, J.; *Sayles v. L. S. & M. S. Ry. Co.*, 9 Fed. R. 515, *per* Mr. Justice

Harlan; *Sayles v. Dubuque & S. C. Ry. Co.*, 9 Fed. R. 516, *per* Dillon and Love, JJ.; *Wood v. Cleveland Rolling Mill*, 4 Fisher's Pat. Cas. 550, *per* Mr. Justice Swayne and Sherman, J.; *May v. County of Fond du Lac*, 27 Fed. R. 691, *per* Dyer, J.; *May v. County of Logan*, 30 Fed. R. 250, *per* Jackson, J.; *McGinnis v. Erie County*, 45 Fed. R. 1, *per* McKennan and Acheson, JJ. See also *Schreiber v. Sharpless*, 17 Fed. R. 589. *Contra*, *Parker v. Hawk*, 2 Fisher's Pat. Cas. 58, *per* Leavitt, J.; *Parker v. Hall*, 2 Fisher's Pat. Cas. 62, note, *per* McLean and Leavitt, JJ.; *Rich v. Ricketts*, 7 Blatchf. 230, *per* Hall, J.; *Sayles v. O. C. R. R. Co.*, 6 Saw. 31, *per* Deady, J.; *Hayden v. Oriental Mills*, 15 Fed. R. 605, *per* Lowell and Colt, JJ. See *McClung v. Silliman*, 3 Peters, 270; *Butler v. Poole*, 44 Fed. R. 586; and *infra*, § 375.

§ 9. ¹ *Hagan v. Lucas*, 10 Pet. 400; *Taylor v. Carryl*, 20 How. 583; *Peale v. Phipps*, 14 How. 368; *Levi v. Columbia Insurance Company*, 1 Fed. R. 206; *Hubbard v. Bellew*, 3 Fed. R. 447; *Union Mutual Life Ins. Company v. University of Chicago*, 6 Fed. R. 443; *Hutchinson v. Green*, 6 Fed. R. 833, 836-839; *Hamilton v. Chouteau*, 6 Fed. R. 339; *Heidritter v. Elizabeth Oil-cloth Company*, 111 U. S. 294. But see *Dwight v. Central Vermont R. R. Co.*, 9 Fed. R. 785.

Even if the custody of the State court were acquired by fraud, a court will not usually interfere so long as the State court retains its hold upon the property.² It has been held too late to raise this objection to the jurisdiction of the State court after the trial of an action at common law.³ This rule did not prevent the filing of a bill in equity against an administrator or an executor during the pendency of probate proceedings in a State court;⁴ nor the appointment of a receiver over property held by executors holding letters testamentary from a State court, who had disagreed and could not act together;⁵ nor the filing of a bill to set aside or stay proceedings upon a judgment in a State court;⁶ nor, under the Judiciary Act of 1875, the removal to a Federal court of a suit in equity in the course of which a State court had appointed a receiver,⁷ or had taken property into its possession under a common-law writ.⁸ Property is deemed to be in the custody of a court from the time when a suit or action seeking to have it put there has been actually begun, either by levy under a writ in a proceeding *in rem*, or by the filing of a bill praying the appointment of a receiver and the service of process.⁹ Where the sheriff held property under summary foreclosure proceedings under the statutes of Georgia, it was held to be in the custody of the State court.¹⁰ Property continues in the custody of the State court until the cause is practically terminated, although no formal termination is absolutely essential.¹¹ Where the trustee of an insolvent debtor had failed to claim property until a levy was made thereon under a judgment obtained by a foreign creditor in a Federal court, a decree was entered upon a petition of intervention by the trustee, setting aside the levy upon con-

² *Attleborough National Bank v. N. W. Manuf. & Car Co.*, 28 Fed. R. 113.

³ *Gilman v. Perkins*, 7 Fed. R. 887.

⁴ *Payne v. Hook*, 7 Wall. 425; *Yonley v. Lavender*, 21 Wall. 276; *Chapman v. Borer*, 1 Fed. R. 274; *Hull v. Dills*, 19 Fed. R. 657.

⁵ *Ball v. Tompkins*, 41 Fed. R. 486. See *infra*, § 240.

⁶ *Barrow v. Hunton*, 99 U. S. 80; *Sahlgard v. Kennedy*, 2 Fed. R. 295.

⁷ *In re Iowa & Minnesota Construction Company*, 10 Fed. R. 401.

⁸ *Kern v. Huidekoper*, 103 U. S. 485, 491, 492.

⁹ *Taylor v. Carryl*, 20 How. (U. S.)

583; *Heidritter v. Elizabeth Oil-cloth Company*, 112 U. S. 294; *Levi v. Columbia Insurance Company*, 1 Fed. R. 206; *Hubbard v. Bellew*, 3 Fed. R. 417; *Union Mutual Life Insurance Company v. University of Chicago*, 6 Fed. R. 443; *Hutchinson v. Green*, 6 Fed. R. 833. But see *Dwight v. Central Vermont R. R. Co.*, 9 Fed. R. 785; *Webb v. Vermont Central R. R. Co.*, 9 Fed. R. 793; *Owens v. Ohio Central R. R. Co.*, 20 Fed. R. 10.

¹⁰ *Tefft v. Sternberg*, 40 Fed. R. 2.

¹¹ *Buck v. Piedmont & A. Life Insurance Company*, 4 Fed. R. 849; *Andrews v. Smith*, 5 Fed. R. 833.

dition that the trustee pay the costs of the seizure, and file in the Federal court an order from the State court authorizing him to take possession of such property.¹² It has been held that when property on which a sheriff has levied is seized by the marshal in a Federal action of replevin, the sheriff's remedy is a petition in the nature of an interpleader addressed to the Federal court, not a bill for an injunction.¹³ This rule is not applicable in those cases where the courts of the United States exercise superior jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States.¹⁴ If the suit be first begun in a Federal court, that court will maintain and enforce its right to the custody of the property.¹⁵ In one case, where a receiver had been appointed, in a suit begun in a State court, after a bill filed in a Federal court praying relief concerning the same property had been dismissed by a decree, the Federal court subsequently opened the decree, and appointed a receiver of the property upon the filing of a supplemental bill at the same term.¹⁶ Property of a debtor brought within the custody of a Federal court by seizure under process issued upon its judgment, remains in custody to be applied in satisfaction of the judgment, notwithstanding the death of the judgment debtor, and the institution in a State court of proceedings to administer his estate.¹⁷

§ 10. **Property in the Custody of a Federal Court.**—The rules which apply between State and Federal courts also regulate conflicts as to jurisdiction between different Federal courts.¹

§ 11. **Illustrations of Equitable Jurisdiction in the Federal Courts.**—The following instances where Federal courts of equity have assumed, and where they have refused, to take jurisdiction in equity, the subject-matter and the parties being within their jurisdiction, although by no means exhaustive, may be useful to

¹² *Gailinger v. Philippi*, 133 U. S. 246, 257.

¹³ *Pickett v. Tiler & Stowell Co.*, 40 Fed. R. 313.

¹⁴ *Tefft v. Sternberg*, 40 Fed. R. 2, 6, per Mr. Justice Speer, citing *Covell v. Heyman*, 111 U. S. 176.

¹⁵ *Heidritter v. Elizabeth Oil-cloth Co.*, 112 U. S. 294; *Covell v. Heyman*, 111 U. S. 176; *Sharon v. Terry*, 36 Fed. R. 337.

¹⁶ *Union Trust Company v. Rockford, R. I., & St. L. R. R. Co.*, 6 Biss. 197.

¹⁷ *Rio Grande R. R. Co. v. Gomila*, 132 U. S. 478, 481.

§ 10. ¹ *Hurd v. Moiles*, 28 Fed. R. 897; *Central Trust Co. v. East Tenn., Va. & Ga. R. Co.*, 30 Fed. R. 895. But see *Wabash* cases, especially *Atkins v. W. St. L. & P. Ry. Co.*, 29 Fed. R. 161; *Central Trust Co. v. W. St. L. & P. Ry. Co.*, 29 Fed. R. 618; *U. S. Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 42 Fed. R. 343; *Mercantile Tr. Co. v. Kanawha & O Ry. Co.*, 39 Fed. R. 337; *Reynolds v. Stockton*, 140 U. S. 254, 272.

the practitioner. It has been held that a bill in equity will be sustained when filed by the United States to enforce its priority of payment out of a trust fund,¹ to cancel a land patent,² or a patent for an invention³ which had been obtained by fraud,⁴ or a land patent which had been by a mistake of law issued in violation of a statute,⁵ or, it seems, a certificate of naturalization obtained by fraud;⁶ by a municipal corporation to enjoin the sale on execution of property held by it in trust;⁷ by a legatee against an executor,⁸ and by one of the next of kin against an administrator and his sureties,⁹ to recover the complainant's share of a decedent's estate; by a married woman to recover money which belongs to her separate estate;¹⁰ by a single man to have declared null and void a paper purporting to be a marriage contract executed by him;¹¹ to set aside a contract obtained by fraud;¹² to set aside a land patent issued in violation of a statute;¹³ to reform an instrument which was executed by mistake;¹⁴ to set aside a conveyance obtained for a grossly inadequate consideration from a man in a state of intoxication, partly caused by the acts of the defendant;¹⁵ by the beneficiary of a trust against his trustee and a debtor of the trust estate;¹⁶ by the holder of a corporate bond to enforce his lien upon the tolls pledged to secure its payment;¹⁷ by a stockholder in a corporation to recover its money fraudulently misappropriated by its directors;¹⁸ by a stockholder against a corporation to compel the retransfer of stock fraudulently transferred to another;¹⁹ and to

§ 11. ¹ *Hunter v. United States*, 5 Pet. 172.

² *Moffat v. United States*, 112 U. S. 24; *United States v. Trinidad Coal & Coke Co.*, 137 U. S. 160.

³ *United States v. Am. Bell Telephone Co.*, 128 U. S. 315; *United States v. Gunning*, 18 Fed. R. 511; s. c. 22 Fed. R. 653. *Contra*, *Attorney-General v. Rumford Chemical Works*, 2 Ban. & A. 298; *United States v. Am. Bell Telephone Co.*, 32 Fed. R. 591; *United States v. Frazer*, 22 Fed. R. 106.

⁴ *Moffat v. United States*, 112 U. S. 24; *United States v. Gunning*, 18 Fed. R. 511; s. c. 22 Fed. R. 653.

⁵ *Mullan v. United States*, 118 U. S. 271; *McLaughlin v. United States*, 197 U. S. 526; *Western Pacific Railroad Co. v. United States*, 108 U. S. 510.

⁶ *United States v. Norsch*, 42 Fed. R. 417.

⁷ *New Orleans v. Morris*, 105 U. S. 600.

⁸ *Mayer v. Foulkrod*, 4 Wash. C.C. 349.

⁹ *Payne v. Hook*, 7 Wall. 425; *Pratt v. Northam*, 5 Mason, 95.

¹⁰ *Hunt v. Danforth*, 2 Curt. 592.

¹¹ *Sharon v. Hill*, 20 Fed. R. 1.

¹² *Boyce v. Grundy*, 3 Pet. 210.

¹³ *Southern Pac. R. Co. v. Wiggs*, 43 Fed. R. 333.

¹⁴ *Walden v. Skinner*, 101 U. S. 577.

¹⁵ *Thackrah v. Haas*, 119 U. S. 499.

¹⁶ *United States v. Myers*, 2 Brock. 516. ¹⁷ *Vallette v. White Water Valley Canal Co.*, 4 McLean, 192.

¹⁸ *Gindrat v. Dane*, 4 Cliff. 260.

¹⁹ *Kilgour v. New Orleans Gas-Light Company*, 2 Woods, 144.

compel the transfer of stock to its equitable owner,²⁰ unless it has been acquired unconscientiously or for speculative purposes,²¹ or the stock is of a kind that can be readily bought in open market; to compel specific performance of a contract for the sale of a patent-right;²² to compel specific performance of a contract to issue an insurance policy, and in the same suit to compel payment of the policy;²³ in Virginia, a bill by a creditor of an insolvent firm which is disposing of its assets in fraud of creditors, filed in behalf of the other creditors as well as himself, and praying the appointment of a receiver, an injunction against any interference by others with the firm assets, and the distribution of those assets among the creditors equally;²⁴ a bill by a trustee and his beneficiary to obtain possession of land subject to the trust;²⁵ to recover from a bank money of the plaintiff deposited by a third person in the latter's name;²⁶ to enjoin a township from setting up as a defense to an action upon bonds issued by it the accidental omission of the town seal thereon;²⁷ to enforce a decree for the payment of money, at least when made by another court of equity;²⁸ to enforce the payment of alimony directed to be paid in the final judgment or decree of a State court;²⁹ to set aside a judgment obtained by accident, mistake, or fraud;³⁰ to set aside an award by arbitrators upon allegations of misconduct not apparent on the face of the award, not affecting the jurisdiction of the arbitrators;³¹ a bill by a creditor of a decedent to set aside a fraudulent conveyance of his estate made after his death by the order of a court;³² by a judgment creditor to apply to the satisfaction of his debt any interest which his debtor may hold in a patent or copyright,³³ or in a license to use

²⁰ *Mechanics' Bank v. Seton*, 1 Pet. 299.

²¹ *Mississippi & Missouri Railroad Company v. Cromwell*, 91 U. S. 643; *Foll's Appeal*, 91 Pa. St. 434, 438; *Randolph's Executor v. Quidnick Company*, 135 U. S. 457.

²² *Hall v. Pitrat*, 45 Fed. R. 94.

²³ *Tayloe v. The Merchants' Fire Ins. Co.*, 9 How. 390; *Hebert v. Mutual Life Ins. Co.*, 12 Fed. R. 807; *Brugger v. State Investment Ins. Co.*, 5 Saw. 304.

²⁴ *Fink v. Patterson*, 21 Fed. R. 602.

²⁵ *Harrison v. Rowan*, 4 Wash. C. C. 202.

²⁶ *Union Stock Yard's Bank v. Gillespie*, 137 U. S. 411, 420; *National Bank v. Insurance Co.*, 104 U. S. 54.

²⁷ *Bernards Township v. Stebbins*, 109 U. S. 341.

²⁸ *Shields v. Thomas*, 18 How. 253, 262. But see *Tilford v. Oakley*, *Hemps*. 197.

²⁹ *Barber v. Barber*, 21 How. 582. Cf. *Johnson v. Johnson*, 13 Fed. R. 193; *Bowman v. Bowman*, 30 Fed. R. 849.

³⁰ *Metcalf v. Williams*, 104 U. S. 93, 95.

³¹ *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. R. 151, 156.

³² *Johnson v. Waters*, 111 U. S. 640.

³³ *Ager v. Murray*, 105 U. S. 426.

a patented invention;³⁴ in the absence of any statutory restrictions, by the resident taxpayers in a county to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt which they in common with other property-holders of the county may otherwise be compelled to pay;³⁵ for an injunction against irremediable injury to property pending an action of ejectment, though filed by a party out of possession;³⁶ under special circumstances, to compel specific performance of a railroad lease and a guaranty of the covenants therein contained;³⁷ and of an agreement to allow any railway company to use a railway track on equitable terms,³⁸ but not of an agreement by a railway company with a city to keep its principal office in such city;³⁹ to compel an accounting by persons standing in a trust relation to the plaintiff,⁴⁰ and by those against whom an action for account render would lie at common law,⁴¹ namely, guardians in socage, bailiffs, receivers, and merchants in their dealings with each other;⁴² but not otherwise⁴³ unless the accounts are mutual, or very complicated and intricate,⁴⁴ or the accounting is supplemental to some other equitable relief.⁴⁵ For example, an account will not be decreed against the infringer of a patent upon a bill filed after the term of the patent has expired.⁴⁶ But a bill filed only a few days before the expiration of a patent may be sustained, if it is possible to obtain equitable relief during the life of the patent;⁴⁷ unless under the practice of the court no in-

³⁴ *Matthews v. Green*, 19 Fed. R. 649.

³⁵ *Mr. Justice Field in Crampton v. Zabriskie*, 101 U. S. 601, 609.

³⁶ *Erhardt v. Boaro*, 113 U. S. 537.

³⁷ *Pennsylvania R. R. Co. v. St. L., A., & T. H. R. R. Co.*, 118 U. S. 290.

³⁸ *Joy v. St. Louis*, 138 U. S. 1.

³⁹ *Texas & P. Ry. Co. v. Marshall*, 136 U. S. 393.

⁴⁰ *P. R. R. of Mo. v. A. & P. R. R. Co.*, 20 Fed. R. 277; *Fowle v. Lawrason*, 5 Pet. 494, 502; *Littlefield v. Perry*, 21 Wall. 205.

⁴¹ *Mitchell v. Manufacturing Co.*, 2 Story, 648; *Ivinson v. Hutton*, 98 U. S. 79; *Fowle v. Lawrason*, 5 Pet. 494, 502.

⁴² *Bispham's Equity*, § 481; 1 Co. Litt. 90 b; 1 Co. Litt. 172 a; *Bacon's Abridgment, Account A*; *Buller's Nisi Prius*, 127; *Earl of Devonshire's Case*, 11 Coke, 89.

⁴³ *Root v. Railway Co.*, 105 U. S. 189; *Consolidated Safety Valve Co. v. Ashton Valve Co.*, 26 Fed. R. 319; *Lord v. Whitehead, & c. Mach. Co.*, 24 Fed. R. 801.

⁴⁴ *Gaines v. New Orleans*, 17 Fed. R. 16; s. c. 4 Woods, 213; *John Crossley Sons v. New Orleans*, 20 Fed. R. 352; *Baker v. Biddle, Bald.* 394; *Blakeley v. Biscoe, Hems.* 114. But see *Lord v. Whitehead, & c. Mach. Co.*, 24 Fed. R. 801; *Adams v. Bridgewater Iron Co.*, 26 Fed. R. 324, and cases cited.

⁴⁵ *Rubber Co. v. Goodyear*, 9 Wall. 788; *Root v. Railway Co.*, 105 U. S. 189.

⁴⁶ *Root v. Railway Co.*, 105 U. S. 189; *Brooks v. Miller*, 28 Fed. R. 615, 617.

⁴⁷ *Beedle v. Bennett*, 122 U. S. 71; *Clark v. Wooster*, 119 U. S. 322, 324; *Westinghouse Air Brake Co. v. Carpenter*, 32 Fed. R. 484, *per Brewer, J.*; *Kittle v. De Graaf*, 30 Fed. R. 689, *per Coxe, J.*;

junction could possibly have been obtained before the expiration of the patent;⁴⁸ and also, perhaps, even when the bill has been filed after the expiration of the patent, if the infringing articles were made during its life.⁴⁹

The Revised Statutes provide that "Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the patent-office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."⁵⁰ The Commissioner of Patents is not a necessary party when there is a party to oppose the bill,⁵¹ but when the patent has been issued and assigned, the assignee is a necessary party.⁵² The Commissioner of Patents, if he resides in the District of Columbia, cannot be made a party to a suit in a Circuit Court of the United States.⁵³ It has been held that the statute does not authorize an injunction against the issue of a

Adams v. Bridgewater Iron Co., 26 Fed. R. 324; *Brooks v. Miller*, 28 Fed. R. 615, 617; *Westinghouse Air Brake Co. v. Carpenter*, 32 Fed. R. 484. A bill was dismissed when the patent expired between the service of the subpoena and the return day, on special circumstances being shown. *American Cable Ry. Co. v. Chicago City Ry. Co.*, 41 Fed. R. 522.

⁴⁸ *Clark v. Wooster*, 119 U. S. 322, 324; *American Cable Ry. Co. v. Citizens' Ry. Co.*, 44 Fed. R. 484; *Keyes v. Eureka Con. Manufacturing Co.*, 45 Fed. R. 199; *American Cable Ry. Co. v. Chicago City Ry. Co.*, 41 Fed. R. 522.

⁴⁹ *N. Y. Belting & Packing Co. v. McGowan*, 27 Fed. R. 111; citing *Root v.*

Railway Co., 105 U. S. 189; *American D. R. B. Co. v. Rutland Marble Co.*, 2 Fed. R. 356, *Am. D. R. B. Co. v. Sheldon*, 1 Fed. R. 870, *Crossley v. Derby Gas-Light Co.*, 4 L. J. Ch. n. s. 25. But see *Westinghouse v. Carpenter*, 43 Fed. R. 894; and *infra*, §§ 216, 236.

⁵⁰ U. S. R. S. § 4915; *Runstetler v. Atkinson*, 23 Off. Gaz. 1025; *Greeley v. Commissioner*, 6 Fisher, 675; s. c. 1 Holmes, 284, *Ex parte Arkell*, 15 Blatchf. 437; *Butterworth v. Hill*, 114 U. S. 128.

⁵¹ *Butler v. Shaw*, 21 Fed. R. 321; *Graham v. Teter*, 25 Fed. R. 555.

⁵² *Graham v. Teter*, 25 Fed. R. 555.

⁵³ *Illingworth v. Atha*, 42 Fed. R. 141, 145.

patent by the Commissioner to some one other than the plaintiff.⁵⁴ A bill to take an account of general average and decree contribution has been sustained.⁵⁵ It has been held that the jurisdiction in equity to open a closed account exists when equity would have had jurisdiction were the account still open, notwithstanding a remedy at law exists.⁵⁶ "It is possible that one who holds land under grant from the United States, who has done everything in his power to entitle him to a patent (which he cannot compel the United States to issue to him), and is deemed the legal owner, so far as to render the land taxable to him by the State in which it lies, may be considered as having sufficient title to sustain a bill in equity to quiet his right and possession."⁵⁷ "To give a court of equity jurisdiction, the nature of the relief asked must be equitable, even when the suit is based on an equitable title."⁵⁸ The inadequacy of the remedy at law which will justify relief in equity, does not consist merely in its failure to produce the relief sought,—that is a not unusual result of all remedies,—but that in its nature or character it is not fitted or adapted to the end in view.⁵⁹

§ 12. **Illustrations of Cases where the Federal Courts have refused to assume Equitable Jurisdiction.**—Equity will not entertain a bill to restrain the President of the United States from carrying into effect an unconstitutional act of Congress, in the discharge of duties "purely executive and political."¹ Nor a bill filed by a State to protect rights which are purely political, even though its rights of property may be thereby incidentally affected.² Nor a bill by a citizen of the United States to enforce an "abstract right" which the complainant asserts, and which he may never practically exercise; as, for example, the right to remove an obstruction from a navigable river, when he does not allege that he is about to navigate the river.³ Nor a bill filed by a coupon-

⁵⁴ *Illingworth v. Atha*, 42 Fed. R. 141, 144.

⁵⁵ *Sturgess v. Cary*, 2 Curt. 59.

⁵⁶ *Bischoffshelm v. Baltzer*, 20 Fed. R. 890.

⁵⁷ *Gray, J.*, in *Frost v. Spitley*, 121 U. S. 552, 556; citing *Carroll v. Safford*, 3 How. 441, 463; *Van Wyck v. Knevals*, 106 U. S. 360, 370; *Van Brocklin v. Tennessee*, 117 U. S. 151, 169.

⁵⁸ *Fussell v. Gregg*, 113 U. S. 550, 554; *per Woods, J.*

⁵⁹ *Miller, J.*, in *Thompson v. Allen County*, 115 U. S. 550, 554. Cf. *Texas & P. Ry. Co. v. Marshall*, 113 U. S. 333, 405.

§ 12. ¹ *Mississippi v. Johnson*, 4 Wall. 475.

² *Georgia v. Stanton*, 6 Wall. 50. Cf. *Georgia v. Grant*, 6 Wall. 241; *Clough v. Curtis*, 134 U. S. 361; *Smith v. Board County Comm'rs Skagit County*, 45 Fed. R. 725.

³ *Spooner v. McConnell*, 1 McLean,

holder, who does not allege himself to be a taxpayer, to enjoin a State officer from refusing to receive his coupons in payment of taxes, as is required by a contract between the coupon-holder and the State.⁴ Nor a bill to compel municipal or State officers to levy a tax, since the remedy when it exists at all is by mandamus.⁵ Nor a bill for the appointment of a receiver to levy⁶ taxes, or to collect taxes previously levied.⁷ Nor a bill to enjoin the collection of an internal revenue tax imposed by the United States and illegally assessed.⁸ Nor a bill to restrain the collection of a State tax, no matter how illegally imposed,⁹ unless its enforcement would lead to a multiplicity of suits,¹⁰ or produce irreparable injury, or throw a cloud upon the title of real estate, or possibly when its assessment was made by a fraud of which equity would take cognizance, or when there is at law no means of recovering its amount.¹¹ Nor a bill to compel a railway com-

337. See *Marye v. Parsons*, 114 U. S. 325.

⁴ *Marye v. Parsons*, 114 U. S. 325.

⁵ *Walkley v. Muscatine*, 6 Wall. 481.

⁶ *Rees v. Watertown*, 19 Wall. 107; *Heine v. Levee Comm'rs*, 19 Wall. 655; *Meriwether v. Garrett*, 102 U. S. 472.

⁷ *Thompson v. Allen County*, 115 U. S. 550.

⁸ U. S. R. S. § 3224; *Snyder v. Marks*, 109 U. S. 189.

⁹ *Hannewinkle v. Georgetown*, 15 Wall. 548; *Dows v. Chicago*, 11 Wall. 108; *State Railroad Tax Cases*, 92 U. S. 575; *Milwaukee v. Koeffler*, 116 U. S. 219.

¹⁰ *Union Pacific Ry. Co. v. Cheyenne*, 113 U. S. 516; *Dundee Mortgage Trust Investment Co. v. School District No. 1*, 19 Fed. R. 359. "It is real and not imaginary suits, it is probable and not possible danger of a multiplicity of suits that will warrant the assumption of jurisdiction on that ground. While it is true, as the plaintiff contends, that the State might bring a separate suit for each day's penalty" for failure to pay a tax, "the court would hardly be justified in acting on the assumption that it would do so. The State is not to be looked upon in the light of a barrator, and the court will not impute to it, or to its officers acting in its name, a litigious or vindictive spirit, or a purpose needlessly to

vex and harass the citizen with lawsuits. Whatever the rule may be in the case of natural persons, the court will presume that a State is incapable of such a vulgar passion, and, until the fact is shown to be otherwise, will act on the assumption that a State will not bring any more suits than are fairly necessary to establish and maintain its rights." *Pacific Express Co. v. Seibert*, 44 Fed. R. 310, 315, *per* Caldwell, J.

¹¹ *First National Bank v. Douglass County*, 3 Dill. 298; *Union Pacific R. R. Co. v. McShane*, 3 Dill. 303, 312. In *Shelton v. Platt*, 139 U. S. 591, 596, 597; where the only jurisdictional averments were "that the property of the United States Express Company in Tennessee is employed in interstate commerce in the said express business, and necessary to the conduct of it; that if seized by the said sheriff it will greatly embarrass the company in the conduct of such business, and subject it to heavy loss and damage, and the public served by it to great loss and inconvenience;" and "that your orator and the United States Express Company are without adequate remedy at law in the premises;" it was held that no injunction should issue.

Chief-Justice Fuller said (pp. 596-597): "The trespass involved in the levy of the distress warrants was not shown to be continuous, destructive, in-

pany to maintain its permanent terminus at a certain place.¹² Nor solely for purposes that could be accomplished by an action in ejectment.¹³ Nor to quiet the title to real estate when the

fictive of injury incapable of being measured in money, or committed by irresponsible persons. So far as appeared, complete compensation for the resulting injury could have been had by recovery of damages in an action at law. There was no allegation of inability on the part of the express company to pay the amount of the taxes claimed, nor any averments showing that the seizure and sale of the particular property which might be levied on would subject it to loss, damage, and inconvenience which would be in their nature irremediable. The bill showed the company to be doing a vast business, and it was an unreasonable inference that it must submit to the sale of its wagons and horses, or that such sale would work that kind of mischief which justifies interference of equity in the application of a preventive remedy. Nor did the mere fact that its property might be used in the conduct of interstate commerce give jurisdiction. But in addition to all this, since 1873 there has been a statute in existence in Tennessee providing a remedy at law, which has been pronounced by this court simple and effective. *Tennessee v. Sneed*, 96 U. S. 69. Under that act, where an officer charged by law with the collection of revenue due the State takes any steps for the collection of the same, a party conceiving the tax to be unjust or illegal may pay it under protest, and sue the officer to recover the money back, and if the court determines that it was wrongfully collected, then upon its certificate to that effect, the comptroller 'shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury.' And the act further provides that there shall be no other remedy in any case of the collection of revenue, and no writ for the prevention of such collection, or to hinder and delay it, shall

in any wise issue, either injunction, supersedeas, prohibition, or any other writ or process whatever."

(p. 600). "While an unconstitutional tax may, in the language of the learned judge holding the Circuit Court, confer no right, impose no duty, and support no obligation, it will be perceived that, in our view, the trespass resulting from proceedings to collect such void taxes cannot be restrained by injunction, where irreparable injury or other ground for equitable interposition is not shown to exist."

In *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658; two bills for an injunction against the collection of taxes under the laws of the State of Tennessee were held insufficient to warrant injunction. The material allegations in those bills were as follows:—

"In No. 1381, the bill alleged that the comptroller was threatening to issue his warrant for the collection of the taxes and to levy it upon the complainant's sleeping cars, 'and your orator believes and fears that said defendant, unless restrained by this honorable court, will proceed to force the collection of said tax so illegally assessed and claimed, by distraining and seizing upon your orator's cars from your orator, and that the proceedings threatened for the collection of said taxes will lead to a multiplicity of suits, and will greatly harass your orator. Your orator further shows that all the sleeping and drawing-room cars aforesaid, running in the State of Tennessee, are attached to through express trains on the roads of said railroad companies; that prior to their arrival in Tennessee seats and sleeping berths therein have always been sold by your orator to persons travelling from other States into Tennessee; that your orator has at all times contracts with passengers to give

¹² *Texas & Pacific Ry. Co. v. Marshall*, 136 U. S. 323.

¹³ *Hipp v. Babin*, 19 How. 271; *Lewis v. Cocks*, 23 Wall. 466; *Ellis v. Davis*,

109 U. S. 485; *Killian v. Ebbinghaus*, 110 U. S. 548; *United States v. Wilson*, 118 U. S. 86; *Speigel v. Meredith*, 4 Biss. 120.

complainant's rights are purely equitable,¹⁴ or, in the absence of a State statute authorizing such a suit, when he is not in possession of the land.¹⁵ Nor, usually, to restrain the seizure or compel the

them the accommodations furnished by said cars while travelling upon such railroads; that unless your orator pays the taxes so illegally imposed upon it, your orator believes and fears that said defendant will, unless restrained therefrom by this court, levy upon and seize, in order to force from your orator said illegal taxes, said sleeping and drawing-room cars while the same are in actual use and running attached to said express trains; that thereby the travelling public will be discommoded, the carriage of passengers interstate will be prevented, your orator and said railroad companies may become harassed by many suits for damages by passengers for not furnishing them the accommodations they contracted for, the credit and reputation of your orator for furnishing comfortable accommodations — which credit and reputation are of great value to it, and have been established by strict attention to business, and at great expense and trouble for many years — will be broken up, and the good-will of said business greatly impaired; and thereby your orator will suffer great and irreparable injury.'

"In No. 1382, complainant averred that the comptroller had issued his warrant to the sheriff of the county of Davidson, Tennessee, and the sheriff by his deputy, one Hobson, 'has by force, and pretending to act under said warrant, seized upon the sleeping car "Wetumpka," belonging to your orator, and now holds the same in their possession; that said car is reasonably worth \$8000; that said Hobson has advertised and threatens to sell said car to satisfy said illegal and pretended tax; that said sleeping car of your orator when seized was being used by your orator in the carrying on of interstate commerce as aforesaid, and was in use as an instrument of interstate commerce, and was in Tennessee only by virtue of such use, and was therefore

not liable to be taken in satisfaction of said tax, even if it had been a valid tax. That the railroad companies over whose lines of road your orator operates cars are common carriers, and are obliged by law to take upon their trains and carry all who properly present themselves for carriage, whether they are travelling between points wholly within Tennessee or not; that such passengers, travelling locally in Tennessee, sometimes apply for sleeping car accommodations in your orator's cars attached to such train, and if your orator is obliged to receive them on its cars, then the State of Tennessee by such tax act forces your orator to pay such privilege tax, and take out such license, or to cease carrying on the interstate commerce in which it is now engaged; that said defendants have demanded said \$3000 from your orator, and have declared that they will force your orator to pay the same; that they now threaten to sell said car so seized by them, and your orator believes will do so unless restrained by this honorable court; that said car is very valuable, but will not bring its full value at a forced sale, and your orator fears that it will be sold for a small amount not sufficient to pay said tax, and your orator believes and fears that said defendants, unless restrained by this honorable court, will thereupon proceed to enforce the collection of said tax so illegally claimed, by distraining and seizing upon your orator's other cars, and that the proceedings threatened by defendants for the collection of said taxes will greatly harass your orator. Your orator further shows that all its sleeping cars aforesaid, running through the State of Tennessee, are attached to through express trains on the roads of the said railroad companies; that prior to their arrival in Tennessee seats and berths have always been sold by your orator to persons travelling from other States into Ten-

¹⁴ *Frost v. Spitley*, 121 U. S. 552.

¹⁵ *United States v. Wilson*, 118 U. S. 86; *Frost v. Spitley*, 121 U. S. 552.

return of personal property,¹⁶ unless its loss by the owner would result in irreparable injury by the destruction of his business and commercial credit,¹⁷ or by rendering it impossible for him to manage his farm,¹⁸ or on account of its unique value,¹⁹ or if it be held in trust.²⁰ That the value of the property is so great that the complainant is unable to give the bond required in an action of replevin, affords no ground for the interference of equity.²¹ Nor can a bill be sustained which seeks to recover damages for a conversion;²² or for a fraudulent misrepresentation;²³ or for a fraudulent conspiracy.²⁴ "In cases of fraud and mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment of money by way of damages, when the like amount can be recovered in an action sounding in tort or for money had and received."²⁵ Nor to collect a note from its maker²⁶ or an indorsee.²⁷ Nor to collect the amount of an in-

nessee; that your orator has at all times contracts with passengers to give them the accommodations furnished by said cars while travelling upon said roads; that unless your orator pays the taxes so illegally imposed upon it, your orator believes and fears that the said defendants will, unless restrained therefrom by this court, sell said car so already levied on, and if it does not bring enough to satisfy said tax will levy upon and seize, in order to force from your orator said illegal tax, its sleeping cars while they are in actual use and running attached to said express trains; that thereby the travelling public will be discommoded, the carriage of passengers interstate will be prevented, your orator and said rail-

road companies may become harassed by many suits by passengers for damages for not furnishing them the accommodations they contracted for, the credit and reputation of your orator for furnishing comfortable accommodations — which credit and reputation are of great value to it, and have been established by strict attention to business, and at great expense and trouble for many years — will be broken up, and the good-will of said business greatly impaired, and thereby your orator will suffer great and irreparable injury." See also *Keithsburg Bridge Co. v. McKay*, 42 Fed. R. 427; *Pacific Express Co. v. Seibert*, 44 Fed. R. 310; *Hoey v. Coleman*, 46 Fed. R. 221, 223.

¹⁵ *Knox v. Smith*, 4 How. 298; *Van Norden v. Morton*, 99 U. S. 378. But see *Crane v. McCoy*, 1 Bond, 422.

¹⁷ *Watson v. Sutherland*, 5 Wall. 74; *North v. Peters*, 138 U. S. 271.

¹⁸ *Breeden v. Lee*, 2 Hughes, 484.

¹⁹ *Pusey v. Pusey*, 1 Vern. 273; *Duke of Somerset v. Cookson*, 3 P. Wms. 389; s. c. 1 Leading Cases in Equity, 821.

²⁰ *New Orleans v. Morris*, 105 U. S. 600.

²¹ *In re Oregon Iron Works*, 4 Saw. 169, 170; s. c. 17 N. B. R. 404.

²² *Dumont v. Fry*, 12 Fed. R. 21.

²³ *Russell v. Clark*, 7 Cranch, 69; *White v. Boyce*, 21 Fed. R. 228.

²⁴ *Ambler v. Choteau*, 107 U. S. 586.

²⁵ *Buzard v. Houston*, 119 U. S. 347, 352; *per Gray, J.*; citing *Parkersburg v. Brown*, 106 U. S. 487, 500; *Ambler v. Choteau*, 107 U. S. 586; *Litchfield v. Ballou*, 114 U. S. 190.

²⁶ *Dowell v. Mitchell*, 105 U. S. 430.

²⁷ *Shields v. Barrow*, 17 How. 130.

insurance policy.²⁸ Nor a bill filed by an insurance company after a loss has occurred, to obtain the cancellation of a policy procured by fraud.²⁹ Nor, except in a very extraordinary case, a bill to enjoin slanders or libels.³⁰ Nor, it has been said, a bill to enjoin criminal proceedings.³¹ Nor a bill to enjoin the removal of an officer of a State or municipality.³² Nor a bill to compel a public officer to perform a ministerial duty.³³ Nor a bill by the assignee of a cause of action to enforce for his own use the legal right of his assignor, when he seeks the aid of equity merely upon the ground that he cannot maintain an action at law in his own name.³⁴ Nor a bill by a private citizen to set aside a land-patent of the United States, on account of fraud upon the government used in its procurement,³⁵ although if fraud were then practised upon the plaintiff he might have relief upon the ground of estoppel.³⁶ Nor a bill filed by a creditor for himself alone to apply equitable assets to the payment of his debt, unless he has obtained a judgment for his claim in a court of the same State or judicial district, and had the return of an execution issued thereon unsatisfied,³⁷ — not even, it has been held, when it is shown that the debtor is insolvent, and has no property which can be reached by legal process,³⁸ — unless to enforce a trust or equitable right.³⁹ Nor, in the absence of a State statute authorizing such a proceeding, a bill to set aside the probate of a will on account of mistake, undue influence, forgery, or other fraud.⁴⁰ Nor to enjoin an action at law to which the complainant has a clear legal defense.⁴¹ Nor to set aside or enjoin proceedings to enforce a

²⁸ *Graves v. Boston Marine Ins. Co.* 2 Cranch, 419.

²⁹ *Home Ins. Co. v. Stanchfield*, 1 Dill. 424; *Insurance Co. v. Bailey*, 13 Wall. 616.

³⁰ *Francis v. Flinn*, 118 U. S. 385; *Baltimore Car Wheel Co. v. Bemis*, 29 Fed. R. 295; *Chapin, Emick v. Kane*, 34 Fed. R. 44; *Louge v. Murbarger*, 44 Fed. R. 222. See § 223.

³¹ *In re Sawyer*, 124 U. S. 200; *Shess v. Noble*, 31 Fed. R. 855. But see *M. Schandler Bottling Co. v. Welch*, 42 Fed. R. 561; *infra*, § 211.

³² *In re Sawyer*, 124 U. S. 200.

³³ *Crane v. J. Bondwater*, 12 U. S. 189.

³⁴ *Hayward v. Andrews*, 106 U. S. 672; *New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205.

³⁵ *Steel v. Smelting Co.*, 106 U. S. 447.

³⁶ *Steel v. Smelting Co.*, 106 U. S. 447, 454.

³⁷ *Case v. Beauregard*, 99 U. S. 119; *Smith v. Railroad Co.*, 99 U. S. 398; *Walser v. Seligman*, 13 Fed. R. 415.

³⁸ *Walser v. Seligman*, 13 Fed. R. 415. But see *Case v. Beauregard*, 101 U. S. 688, at page 690.

³⁹ *Case v. Beauregard*, 101 U. S. 688, at page 690.

⁴⁰ *Broderick's Will*, 21 Wall. 503; *Ellis v. Davis*, 109 U. S. 485; *Simmons v. Saul*, 138 U. S. 439.

⁴¹ *Grand-Chute v. Winegar*, 15 Wall. 373; *Francis v. Flinn*, 118 U. S. 385; *Hagood v. Hewitt*, 119 U. S. 226. See *Drexel v. Berney*, 122 U. S. 241.

judgment at law because of fraud; unless the complainant had a defense to the action upon the merits;⁴² and either the fraud was extrinsic to the matter tried and not in issue in the former suit, nor then known to the complainant, or some unconscientious advantage was taken of the successful judgment debtor during the progress of the suit without any fault or negligence upon his part.⁴³ Nor to set aside a judgment at law⁴⁴ or a decree in equity⁴⁵ for an omission to serve a party to the same, except perhaps when the record shows an apparent service. It was held by Chief Justice Chase that an insolvent cannot maintain a bill for the appointment of a receiver to distribute his assets among his creditors.⁴⁶ It has been said that a receiver, assignee in bankruptcy, or assignee under a voluntary general assignment, each of whom represents creditors as well as the debtor, cannot maintain a bill to enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent.⁴⁷ A bill was dismissed, which sought to enforce specific performance of a contract containing a power of revocation by the defendant.⁴⁸ So was a bill to compel the transfer of corporate stock, which the complainant obtained for an inadequate consideration, and which he wished to use for purely speculative purposes and to gain thereby an unconscientious advantage.⁴⁹ In the absence of statutory authority, a private individual cannot file a bill to obtain the forfeiture of a corporate franchise.⁵⁰ Nor can a corporation be enjoined from acting beyond its legal powers at the suit of a business rival not one of its stockholders.⁵¹ Nor can a stockholder file a bill, founded upon rights which may properly be asserted by his corporation, against it and other parties, unless there exists "as the foundation of the suit some action or threatened action of the managing board of directors

⁴² *White v. Crow*, 110 U. S. 183. *Contra*, *Mills v. Scott*, 43 Fed. R. 452.

⁴³ *Life Ins. Co. v. Bangs*, 103 U. S. 780, 782; *Cragin v. Lovell*, 109 U. S. 194. See *Knox County v. Harshman*, 133 U. S. 152, *Leavenworth County Comm'rs v. Chicago, R. I. & P. Ry. Co.* 134 U. S. 688.

⁴⁴ *Lewis v. Cocks*, 23 Wall. 466.

⁴⁵ *Yeatman v. Bradford*, 44 Fed. R. 536.

⁴⁶ *Hugh v. McRae*, Chase's Dec. 466. *Contra*, *Brassey v. N. Y. & N. E. R. R. Co.*, 19 Fed. R. 663; *Wabash, St. L. & P. Ry.*

Co. v. Central Trust Co., 22 Fed. R. 272. See *Beach on Receivers*, § 527.

⁴⁷ *Jacobson v. Allen*, 12 Fed. R. 454.

⁴⁸ *Express Co. v. Railroad Co.*, 99 U. S. 191.

⁴⁹ *M. & M. R. R. Co. v. Cromwell*, 91 U. S. 643. See *Foll's Appeal*, 91 Pa. St. 434; *Randolph's Executor v. Quidnick Company*, 135 U. S. 457, 459.

⁵⁰ *Gaylord v. Fort Wayne M. & C. R. R. Co.*, 6 Biss 286.

⁵¹ *Railroad Co. v. Ellerman*, 105 U. S. 166.

or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which, to prevent irremediable injury or a total failure of justice, the court would be justified in exercising its powers; but the foregoing may be regarded as an outline of the principles which govern this class of cases. But in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done or it was not reasonable to require it."⁵² Analogous rules regulate a suit by a stockholder to set aside a contract by the corporation as beyond the powers conferred in its charter.⁵³

⁵² *Hawes v. Oakland*, 104 U. S. 450, 460, 461; *per Miller, J.* See also *Huntington v. Palmer*, 104 U. S. 482; *Greenwood v. Freight Co.*, 105 U. S. 13; *Detroit v. Dean*, 106 U. S. 537; *Quincy v. Steel*, 120 U. S. 241; *County of Tazewell v. Farmers' L. & Tr. Co.*, 12 Fed. R.

752. See also Equity Rule 94, and *infra*, §§ 76, 87, 207.

⁵³ *Dimpfell v. Ohio & Mississippi R. R. Co.*, 110 U. S. 209; *Tazewell v. Farmers' Loan & Trust Co.*, 12 Fed. R. 752; *Greenwood v. Freight Co.*, 105 U. S. 13.

Where a stockholder filed a bill against the corporation, the directors, and another stockholder, charging that the individual defendants had entered into a conspiracy to do an unlawful and fraudulent act, in furtherance of their individual interests, which would destroy or seriously impair the value of the property of the corporation; that the individual defendants held among themselves seven-tenths of the stock, and had procured a vote of the stockholders authorizing the corporation to carry out the project, and prayed an injunction to prevent this, the bill was held good on demurrer, although it showed no previous effort to obtain redress, from the directors or stockholders, when no outsider was made a party defendant.⁵⁴ It has been said that a court of equity has no power to seize a man's property, and through its officers complete a bridge in pursuance of a contract which he has made.⁵⁵ Nor is it a sufficient ground for the interference of a court of equity that the evidence in a cause is voluminous and tedious.⁵⁶

§ 13. **Federal Courts which have Jurisdiction in Equity.**—The equitable jurisdiction of the Federal courts, from which category the courts of the Territories and of the District of Columbia are here excluded,¹ is in the Supreme Court, the Circuit Courts of Appeal, the Circuit Courts, the District Courts, the Court of Claims, and the Court of Private Land Claims.

§ 14. **Original Jurisdiction of the Supreme Court.**—The Supreme Court has original jurisdiction both at law and equity in all cases affecting ambassadors, other public ministers and consuls, and those in which a State is a party.¹ The jurisdiction of the Supreme Court over controversies to which a State is a party is exclusive, except as regards controversies between a State and its citizens, or between a State and citizens of other States.² In suits to which a State is a party the practice in equity is followed.³ The Supreme Court has exclusively all such jurisdiction of suits against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations; and original, but not exclusive, jurisdiction of all suits

⁵⁴ *Barr v. Pittsburgh Plate-Glass Co.*,
40 Fed. R. 412.

⁵⁵ *Texas & St. Louis Ry. Co. v. Rust*,
17 Fed. R. 275.

⁵⁶ *Bowen v. Chase*, 94 U. S. 812, 824.

§ 13. ¹ See *Clinton v. Englebrecht*, 13
Wall 434.

§ 14. ¹ Const. art. iii.

² U. S. R. S. § 687.

³ *Georgia v. Brailsford*, 2 Dall. 402;
Kentucky v. Dennison, 24 How. 206.

brought by ambassadors, or other public ministers, or in which a consul is a party.⁴

A State may file a bill against another State to settle and establish a disputed boundary.⁵ In such a suit the United States has an interest in the controversy, and the attorney-general on his application may intervene and appear on behalf of the United States and adduce proofs and be heard in argument without making the United States a party in the technical sense of the term; but he has no right to interfere in the pleading or evidence or admissions of either of the States; and in such a suit the judgment cannot be either for or against the United States.⁶ Written authority from the governor of a State is sufficient to authorize a suit on behalf of the State.⁷ In a suit by a State against another State the service of a subpoena sixty days before the return day is sufficient.⁸ Service should be made on both the governor and the attorney-general.⁹ In one case a subpoena served upon the governor by leaving a copy at his house and there showing the original to the secretary of state, was held sufficient.¹⁰

The filing of a pleading by the attorney-general of a State who has been admitted to practice in the Supreme Court of the United States is an appearance on behalf of such State.¹¹ The rules concerning the time for pleading in suits between individuals do not apply to suits between the different States.¹² The State of Massachusetts was allowed to answer an amended bill of the State of Rhode Island one year after the filing of such amended bill.¹³ If the State fail to appear, or if the State withdraw its appearance, no coercive measures will be taken to compel its appear-

⁴ U. S. R. S. § 687.

⁵ *State of New Jersey v. State of New York*, 3 Peters, 461; s. c. 5 Peters, 284; s. c. 6 Peters, 323; *Massachusetts v. Rhode Island*, 12 Peters, 755; *Rhode Island v. Massachusetts*, 13 Peters, 23; *Florida v. Georgia*, 17 How. 478; *Rhode Island v. Massachusetts*, 15 Peters, 233; s. c. 4 How. 591; *Missouri v. Iowa*, 7 How. 660; *Florida v. Georgia*, 17 How. 478; *Virginia v. West Virginia*, 11 Wall. 20; *Missouri v. Iowa*, 10 How. 1; *Alabama v. Georgia*, 23 How. 505; *Missouri v. Kentucky*, 11 Wall. 395.

⁶ *Florida v. Georgia*, 17 How. 478.

⁷ *Texas v. White*, 7 Wall. 700, 719.

⁸ *New Jersey v. New York*, 6 Peters, 323.

⁹ *Chisholm v. Georgia*, 2 Dallas, 419; *Grayson v. Virginia*, 3 Dallas, 320; *New Jersey v. New York*, 3 Peters, 461; s. c. 5 Peters, 284; *Commonwealth of Kentucky v. Dennison*, 24 How. 66.

¹⁰ *Huger v. South Carolina*, 3 Dallas, 339.

¹¹ *State of New Jersey v. State of New York*, 6 Peters, 623.

¹² *State of Rhode Island v. State of Massachusetts*, 13 Peters, 23.

¹³ *State of Rhode Island v. State of Massachusetts*, 13 Peters, 23.

ance, but the complainant may be allowed to proceed *ex parte*.¹⁴ A State cannot maintain a bill in equity to protect a purely political right.¹⁵ A State cannot obtain an order or judgment compelling the governor of another State to return a fugitive from labor or justice.¹⁶ In a suit to settle a disputed boundary, the most appropriate mode of proceeding is by bill and cross-bill.¹⁷

A State cannot sue one of its own citizens in the Supreme Court of the United States.¹⁸ The allegation that a defendant corporation is "a body politic in the law of and doing business in the State of California" is insufficient to establish that the defendant is a California corporation, and is insufficient to show that the defendant is not a Pennsylvania corporation.¹⁹ A State cannot sue another State to collect bonds and coupons of the defendant which have been assigned to the plaintiff by its own citizens in order that it may collect them and pay the proceeds to the assignors.²⁰ A suit by a State to collect a judgment for penalties obtained in one of its own courts against a foreign corporation cannot be maintained in the Supreme Court of the United States.²¹ A State may sue for an injunction against the collection by citizens of other States of certain bonds of the United States which are the property of such State, and for the delivery to it of such bonds, and for a declaration that the contract under which the defendants claim a title to such bonds is void.²² A State may maintain a bill against citizens of other States to enforce its title to a railroad.²³ The fact that a State is a stockholder in a corporation by or against which a suit is brought does not make the State a party to such suit.²⁴

The appellate jurisdiction of the Supreme Court is explained in the final chapter of this work. Incidental to such appellate jurisdiction, the Supreme Court has power in certain limited cases

¹⁴ *State of Massachusetts v. State of Rhode Island*, 12 Peters, 755; *Oswald v. New York*, 2 Dallas, 415; *Chisholm v. Georgia*, 2 Dallas, 419.

¹⁵ *Georgia v. Stanton*, 6 Wall. 50.

¹⁶ *Commonwealth of Kentucky v. Denison*, 24 How. 66.

¹⁷ *Missouri v. Iowa*, 7 How. 660.

¹⁸ *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553.

¹⁹ *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553.

²⁰ *New Hampshire v. Louisiana*, 108 U. S. 76.

²¹ *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265.

²² *Texas v. White*, 7 Wall. 700, 741-743.

²³ *State of Florida v. Anderson*, 91 U. S. 667.

²⁴ *The Bank of the United States v. The Planters' Bank of Georgia*, 9 Wheat 994.

to issue writs of prohibition,²⁵ *mandamus*,²⁶ *habeas corpus*,²⁷ *seire facias*, and other writs.²⁸

§ 14 a. **Jurisdiction of the Circuit Courts of Appeal.** There are nine Circuit Courts of Appeal, one in each circuit.¹ Their jurisdiction is exclusively appellate, and will be explained in the concluding chapter of this work. Incidental to such appellate jurisdiction, they have the power to issue writs of *seire facias* and all writs not specifically provided for by statute, which are necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law.²

§ 15. **Jurisdiction of the Circuit Courts of the United States.** — The Circuit Courts of the United States have original cognizance, concurrently with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made under their authority, or in which controversy the United States are plaintiffs or petitioners: suits in which there is a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of costs, the sum or value aforesaid; or a controversy between citizens of the same State, claiming land under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid:¹ and, irrespective of the value of the matter in dispute, of cases commenced by the United States or by direction of any officer thereof against national banks, or cases for winding up the affairs of any such bank;² and all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States, whether

¹ U. S. R. S. § 658. See *infra*, §§ 361, 362.

² U. S. R. S. § 658. See *infra*, §§ 361, 362, 363, 364.

³ U. S. R. S. § 751. See *infra*, §§ 366, 367, 368.

⁴ U. S. R. S. § 658. See *infra*, §§ 361, 365.

⁵ 11 *U. S. St. at L.* 829, § 12.

⁶ U. S. R. S. § 716; 26 *St. at L.* 829,

§ 12. See *infra*, §§ 361-368.

⁷ 15 *U. S. St. at L.* ch. 373, p. 552.

⁸ 24 *St. at L.* ch. 373, § 4, p. 552. See *Armstrong v. Ettlesohn*, 36 *Fed. R.* 209; *Armstrong v. Trautmann*, 36 *Fed. R.* 275; *McConville v. Gilmour*, 36 *Fed. R.* 277.

such suit was originally brought in one of them or removed there according to law from a State court;³ of suits against the United States, to collect claims of more than \$1000 and not exceeding \$10,000, for money only, founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any contract, expressed or implied, with the government of the United States; or for damages, liquidated or unliquidated, in cases not sounding in tort in respect of which claims the plaintiff would be entitled to redress against the United States, in a court of law, equity, or admiralty, if the United States were suable, — except war claims, and except other claims, which, before March 3, 1887, were rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same;⁴ of proceedings to condemn for national public uses land within their respective districts;⁵ of suits to recover penalties under the act forbidding the importation of persons under a contract to perform labor;⁶ of suits to enforce and prevent violations of the acts to protect trade and commerce against unlawful restraints,⁷ the act to prevent the unlawful occupation of public lands,⁸ and the act to execute provisions of the treaties with China;⁹ proceedings to review the decisions of the general appraisers¹⁰ and under certain special statutes. Formerly Circuit Courts of the United States had jurisdiction, without regard to the value of the matter in dispute, of all suits at law or in equity arising under the patent, trademark, or copyright laws of the United States, or under any act providing for internal revenue or revenue from imports or tonnage, or under the postal laws, or under any of the laws relating to the slave and cooley trade; of suits by the assignees of debentures for drawback of duties; of proceedings by the writ of *quo warranto* prosecuted by a district attorney of the United States for the removal from office of any person holding office contrary to the

³ U. S. R. S. § 629; 24 St. at L. ch. 373, § 5.

⁴ 24 St. at L. 505; U. S. v. Jones, 131 U. S. 1. See *infra*, § 36.

⁵ 25 St. at L. ch. 728, p. 357. See *infra*, § 381.

⁶ 23 St. at L. 332; U. S. v. Mexican Nat. Ry. Co., 40 Fed. R. 269. See U. S. v. Rector of the Church of the Holy Trinity, 36 Fed. R. 303; U. S. v. Craig, 28 Fed. R. 795; 26 St. at L. 1084.

⁷ 26 St. at L. 209; U. S. v. Jellico Mountain Coke & Coal Co., 43 Fed. R. 898; s. c. 46 Fed. R. 432. See American Biscuit & Manuf. Co. v. Klitz, 44 Fed. R. 721, 725, 726.

⁸ 23 St. at L. 321.

⁹ 24 St. at L. 409.

¹⁰ 26 St. at L. 138; *In re* Blumlein, 45 Fed. R. 236; *In re* Dieckerhoff, 45 Fed. R. 235; *In re* Dowling, 45 Fed. R. 412.

Fourteenth Amendment to the Constitution, except a member of Congress or of a State legislature; and of suits to recover possession of any office except that of elector of President or Vice President, representative or delegate in Congress, or member of a State legislature, authorized by law to be brought, wherein it appeared that the sole question touching the title to such office arose out of the denial of the right to vote to any citizen on account of race, color, or previous condition of servitude.¹¹ Whether the Act of 1887 has deprived the Circuit Courts of this jurisdiction is under the authorities a doubtful question.¹² It has been held at circuit that those courts still have jurisdiction, irrespective of the value of the matter in dispute, of suits at law or in equity arising under the patent and copyright laws;¹³ of suits at law or in equity arising under the revenue laws;¹⁴ and of actions at common law by the United States or an officer thereof, including in this term a receiver of a national bank appointed by the comptroller.¹⁵ No Circuit Court of the United States has cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other *chose in action*, in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.¹⁶

§ 16. *Matter in Dispute.* — The value of the matter in dispute must ordinarily exceed, exclusive of interest and costs, the sum of two thousand dollars.¹ This signifies not the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but the amount in dispute between the parties in the pending suit.² Thus, the reason that, on account of its probative force, the judgment may operate as an estoppel in a subsequent proceeding, does not increase the value

¹¹ U. S. R. S. § 629, 2159, 3213; 18 St. at L. 178.

¹² 24 St. at L. 352; Act of March 3, 1887, c. 373, § 5 and 6.

¹³ *Miller-Muore Co. v. Carpenter*, 34 Fed. R. 433. See *United States v. Mooney*, 116 U. S. 104, 107.

¹⁴ *Ames v. Hager*, 36 Fed. R. 129.

¹⁵ *Armstrong v. Ettlesohn*, 36 Fed. R. 207; *Armstrong v. Trautmann*, 36 Fed. R. 275; *McConville v. Gilmour*, 36 Fed. R. 277; *Stephens v. Bernays*, 41 Fed. R.

642; *United States v. Kentucky River Mills*, 45 Fed. R. 273. *Contra*, *United States v. Huffmaster*, 35 Fed. R. 81.

¹⁶ Act of March 3, 1887, § 1, 24 St. at L. ch. 373, p. 552, as amended by act of August, 13, 1888, 25 St. at L. p. 433.

§ 16. ¹ Act of March 3, 1887, § 1, 24 St. at L. ch. 373, p. 552.

² *Ross v. Prentiss*, 3 How. 771, 772; *Elgin v. Marshall*, 106 U. S. 579. *Bruce v. M. & K. R. R. Co.*, 117 U. S. 514.

of the matter in dispute.³ Where the suit is upon a demand on which the law liquidates the damages for a default, the amount of the damages as liquidated by the law, not the amount named in the plaintiff's pleading, is the value of the matter in dispute;⁴ but where the alleged cause of action is one in which the law does not liquidate the damages, the amount for which the plaintiff demands judgment is alone to be considered,⁵ unless it clearly appears that the amount named is merely colorable and beyond the amount of a reasonable expectation of recovery.⁶ Thus, in an action of debt on a bond of one hundred dollars, the principal and interest are put in demand, and no more can be recovered except costs, though the plaintiff lay his damages at ten thousand dollars. The value of the matter in dispute cannot, therefore, exceed one hundred dollars with interest and costs.⁷ But in an action for false imprisonment⁸ or assault and battery, the law prescribes no limitation to the amount which can be recovered; and the amount claimed by the plaintiff is the sole criterion to which resort can be had in settling the question of jurisdiction.⁹ Where a defendant's counterclaim has been dismissed and judgment rendered for the plaintiff, the amount of the counterclaim added to the amount recovered by the plaintiff is the matter in dispute.¹⁰ The value of property sued for is not always the matter in dispute.¹¹ Where a complaint contains several counts, each for a separate sum alleged to be due, and disputed by the defendant, the aggregate of the sums constitutes the value of the matter in dispute.¹² The value of the matter in dispute in a suit for an accounting has been said to be the amount of the disputed items of the account.¹³ In a suit for an injunction the amount in dispute is the value of the

³ *Elgin v. Marshall*, 106 U. S. 579; *Bruce v. M. & K. R. R. Co.*, 117 U. S. 514.

⁴ *Wilson v. Daniel*, 3 Dall. 401, 407; *Barry v. Edmunds*, 116 U. S. 550, 560.

⁵ *Smith v. Greenhow*, 109 U. S. 669; *Wilson v. Daniel*, 3 Dall. 401, 407; *Barry v. Edmunds*, 116 U. S. 550, 560; *Gorman v. Havird*, 141 U. S. 206.

⁶ *Lee v. Watson*, 1 Wall. 337; *Bowman v. Chicago & N. W. Ry. Co.*, 115 U. S. 611, 616; *Smith v. Greenhow*, 109 U. S. 669.

⁷ *Wilson v. Daniel*, 3 Dall. 401, 407.

⁸ *Hynes v. Biggs*, 41 Fed. R. 468.

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⁹ *Wilson v. Daniel*, 3 Dall. 401, 407; *Barry v. Edmunds*, 116 U. S. 550, 560. But see *Maxwell v. Atchison, T. & S. F. R. Co.*, 3 Fed. R. 286.

¹⁰ *Dushane v. Benedict*, 120 U. S. 630; See *Lovell v. Cragin*, 136 U. S. 130, 146, *infra*, § 385.

¹¹ *Gibson v. Shufeldt*, 122 U. S. 27, 29; *per Gray, J.*

¹² *Armstrong v. Ettlesohn*, 36 Fed. R. 209; *Bernheim v. Birnbaum*, 30 Fed. R. 885, 887.

¹³ *McCormick v. Gray*, 13 How. 26.

object to be gained by the bill, not merely the amount of damages already suffered by the complainant.¹⁴ Thus, in a suit to enjoin the use of a trademark and compel an account of profits, the value of the matter in dispute is the value of the trademark, not the amount of profits which the defendant has derived from its use.¹⁵ In a suit to enjoin the use of a railway by a party not its owner, the value of the use of the railway, not the value of the railway, was held to be the value of the matter in dispute.¹⁶ In a suit to cancel a paper purporting to be a marriage contract, the amount of the provision which the woman would be entitled to receive from her husband, were the contract held binding, is the value of the matter in dispute.¹⁷ In a suit to quiet title, the value of the property affected is the value of the matter in dispute.¹⁸ The value of the subject-matter in an appeal in a suit by a taxpayer to enjoin the levy of tax for payment of bonds is the amount of the whole tax levy which it is sought to be enjoined.¹⁹ In a stockholder's suit to enforce a cause of action belonging to his corporation, the value of the matter in dispute was held to be the value of the corporate right sought to be enforced, not the value of the plaintiff's interest therein.²⁰ Where a number of plaintiffs, claiming under the same title and having a common interest in the relief sought, unite in a suit, action, or proceeding, their united interests constitute the matter in dispute.²¹ Where, however, a suit is brought by one for himself and all others of a class similarly situated, the aggregate interest of all those who join with him, not that of the whole class, constitutes the matter in dispute.²² The in-

¹⁴ *Mississippi & Mo. R. R. Co. v. Ward*, 2 Black, 485; *Market Co. v. Hoffman*, 101 U. S. 112; *Symonds v. Greene*, 28 Fed. R. 834; *Whitman v. Hubbell*, 30 Fed. R. 81.

¹⁵ *Symonds v. Greene*, 28 Fed. R. 834.

¹⁶ *Oleson v. Northern Pac. R. R. Co.*, 44 Fed. R. 1.

¹⁷ *Shuman v. Terry*, 30 Fed. R. 337.

¹⁸ *L. & N. Zinc & Iron Co. v. N. J. Zinc & Iron Co.*, 43 Fed. R. 545.

¹⁹ *Brown v. Trousdale*, 138 U. S. 389. But see *Murphy v. East Portland*, 42 Fed. R. 308; *American Fertilizer Co. v. Board of Agriculture of North Carolina*, 43 Fed. R. 600.

²⁰ *Hill v. Glasgow R. Co.*, 41 Fed. R. 610.

²¹ *Shields v. Thomas*, 17 How. 3; *Market Co. v. Hoffman*, 101 U. S. 112; *Davies v. Corbin*, 112 U. S. 36; *Estes v. Gunter*, 121 U. S. 183; *Lovett v. Prentice*, 44 Fed. R. 459. See *Gibson v. Shufeldt*, 122 U. S. 27; *Clay v. Field*, 138 U. S. 444, 479.

²² *Bruce v. Manchester & K. R. R. Co.*, 117 U. S. 514, 516; *Massa v. Cutting*, 30 Fed. R. 1; *Adams v. Board of County Comm'rs, McCahon* (U. S. C. C. D. Kan.), 235; *Rich v. Bray*, 37 Fed. R. 273; *Johnson v. Waters*, 111 U. S. 640; *Handley v. Stutz*, 137 U. S. 366, 369; *Miller v. Clark*, 138 U. S. 223. But see *Brown v. Trousdale*, 138 U. S. 389; *Hill v. Glasgow R. Co.*, 41 Fed. R. 610.

terest excluded from consideration includes interest accrued on a demand before the suit was brought.²³ Coupons when attached to a bond upon which suit is brought are considered as interest, and excluded from consideration when determining the jurisdiction.²⁴ It has been held that notarial fees for presentation and protest of a note, though paid before suit brought, are costs, not damages, and cannot be considered in estimating the value of the matter in dispute.²⁵ The fact that part of plaintiff's claim is barred by the statute of limitations will not divest the court of jurisdiction.²⁶ An admission by the defendant in his pleading of part of the plaintiff's demand will not divest the court of jurisdiction.²⁷

§ 17. Suits arising under the Constitution or Laws of the United States. — A suit arises under the Constitution or a law of the United States whenever its correct decision depends on the construction of either.¹ "When a proposition has once been decided by the Supreme Court of the United States, it can no longer be said that in it there still remains a Federal question. More correctly it is said that there is no question, State or Federal."² When either party is a corporation chartered by Congress, the case is one arising out of a law of the United States.³ Not, however, when the sole corporate party derived its charter from a Territorial law.⁴ Suits to which national banks are parties are exempted from the operation of this rule, except cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.⁵ This ex-

²³ *Moore v. Edgefield*, 22 Fed. R. 498.

²⁴ *Howard v. Bates County*, 43 Fed. R. 276.

²⁵ *Baker v. Howell*, 44 Fed. R. 413; *U. S. C. C. D. Nebraska*, Caldwell and Dundy, J.J.

²⁶ *Harding v. Cass County*, 42 Fed. R. 652.

²⁷ *Fuller v. Met. Life Ins. Co.*, 37 Fed. R. 163.

§ 17 ¹ *Cohens v. Virginia*, 6 Wheat. 264, 379; *Tennessee v. Davis*, 100 U. S. 257, 264; *Starin v. New York*, 115 U. S. 248, 257; *Southern Pacific R. R. Co. v. California*, 118 U. S. 109, 112. But see *Commonwealth of Kentucky v. Louisville Bridge Co.*, 42 Fed. R. 241.

² *Brewer, J.*, in *Kansas v. Bradley*, 26

Fed. R. 289, 290. See *Starin v. New York*, 115 U. S. 248, 257; *Southern Pacific R. R. Co. v. California*, 118 U. S. 109, 112.

³ *Osborn v. U. S. Bank*, 9 Wheat. 738, 823; *Pacific Railroad Removal Cases*, 115 U. S. 1; *Farmers' L. & Tr. Co. v. Denver*, S. P. & P. R. R. Co., 1 Ry. & Corp. L. J. 584.

⁴ *Adams Express Co. v. Denver & R. G. R. Co.*, 16 Fed. R. 712.

⁵ Act of March 3, 1887, § 4, 24 St. at I. ch. 373, p. 552. See *Armstrong v. Ettlesohn*, 36 Fed. R. 209; *Armstrong v. Trautmann*, 36 Fed. R. 275; *McConville v. Gilmour*, 36 Fed. R. 277; *Whittimore v. Amoskeag Nat. Bank*, 134 U. S. 527; *First Nat. Bank v. Forest*, 40 Fed. R. 705;

ception leaves the Circuit and District Courts with jurisdiction over cases commenced after the Act of 1887.⁶ It has been held that a case does not arise under the laws of the United States, though brought to enjoin the infringement of a patent, when the defendant admits the validity of the patent, and rests his defense upon an alleged license from the plaintiff.⁷ A suit to determine the title to a patent the validity of which is not disputed does not arise under the Constitution and laws of the United States.⁸ A suit to set aside a land patent solely on account of fraud has been held not to arise under the Constitution and laws of the United States.⁹ Where, however, the decision of a case depends upon the construction of a patent for an invention or a land patent, or upon the construction of the land laws, mining laws, or patent laws, the suit arises under the laws of the United States.¹⁰ A suit to enjoin a receiver appointed by a Federal court has been held to arise under the laws of the United States.¹¹ A suit to recover property taken by a receiver of a national bank under color of a law of the United States arises under the laws of the United States.¹² A suit upon a marshal's bond arises under the laws of the United States.¹³ A suit against a marshal for levying under a writ upon property claimed by a stranger to the suit on which the writ issued but which the marshal claims belonged to the defendant to the writ, arises under the laws of the United States;¹⁴ but a suit against a marshal for a levy upon goods which he does not claim to be the property of a person named in the writ does not arise under the

Farmers' Nat. Bank v. McElhinney, 42 Fed. R. 801; *Sowles v. First Nat. Bank of St. Albans*, 46 Fed. R. 513. See § 19.

⁶ *Stephens v. Bernays*, 44 Fed. R. 642.

⁷ *Hartell v. Tilghman*, 99 U. S. 547; *Wilson v. Sanford*, 10 How. 99; *Albright v. Teas*, 106 U. S. 613; *Dale Tile Manuf. Co. v. Hyatt*, 125 U. S. 46; *Felix v. Scharnweber*, 125 U. S. 54; *McCarty & Hall Trading Co. v. Glaenger*, 30 Fed. R. 387. But see *Smith v. Standard Laundry Mach. Co.*, 19 Fed. R. 825; *Continental Store Service Co. v. Clark*, 100 N. Y. 355; *Hut Sweet Manuf. Co. v. Reineohl*, 102 N. Y. 167; *Puetz v. Bransford*, 32 Fed. R. 318; *St. Paul Plow Works v. Starling*, 127 U. S. 376; *Seibert C. O. Cup Co. v. Manning*, 32 Fed. R. 925.

Montgomery Palace Stove Car Co. v. Street Stable Car Line, 43 Fed. R. 329.

⁹ *Holland v. Hyde*, 41 Fed. R. 977.

¹⁰ *Dunton v. Muth*, 45 Fed. R. 390, 395; *Jones v. Florida C. & P. R. Co.*, 41 Fed. R. 70; *Murray v. Bluebird Min. Co. Ltd.*, 45 Fed. R. 385; *Cheesman v. Shreve*, 37 Fed. R. 36.

¹¹ *Evans v. Dillingham*, 43 Fed. R. 177. But see 25 St. at L. ch. 896, § 3, p. 434; *infra*, § 251.

¹² *Sowles v. Witters*, 43 Fed. R. 700.

¹³ *Teibelman v. Packard*, 100 U. S. 421; *Bachrack v. Norton*, 132 U. S. 337.

¹⁴ *Bock v. Perkins*, 139 U. S. 628. But see *Buck v. Colbath*, 3 Wall. 531.

laws of the United States.¹⁵ A suit on a judgment recovered in a court of the United States is not necessarily a suit arising under the laws of the United States.¹⁶ A case does not arise under the laws of the United States simply because a Federal court has decided in another suit the questions of law which are involved.¹⁷ No Federal question is raised by an answer that is bad in substance without reference to the Federal question which it seeks to plead.¹⁸

§ 18. **Controversy between Citizens of different States.**—A controversy between citizens of different States is one in which every party upon one side is a citizen of a different State from every party upon the other.¹

The citizenship of formal parties with no real interest in the controversy does not affect the jurisdiction.² Such are the husband of the plaintiff when made a defendant to a suit against another to enforce the trusts of a marriage settlement;³ a State in a suit by it for the use of one of its citizens brought upon a bond given by an administrator;⁴ an agent⁵ or attorney⁶ of a corporation when a defendant to a suit against it which seeks no relief against him; the sheriff and the commissioners of appraisal summoned by him when defendants to a suit to enjoin a corporation from prosecuting condemnation proceedings.⁷

In determining between whom the controversy exists, the court is not bound by the title of the cause, or the form of the pleadings, but should examine the record, ascertain the matter in dispute, and arrange the parties on opposite sides of the same according to the facts, no matter what their technical place as plaintiffs or defendants may be.⁸ In a suit by taxpayers against

¹⁵ *Buck v. Colbath*, 3 Wall. 53.

³ *Wormley v. Wormley*, 8 Wheat. 421.

¹⁶ *Provident Savings Society v. Ford*, 114 U. S. 635; *Metcalf v. Watertown*, 128 U. S. 586. See *Winter v. Swinburne*, 8 Fed. R. 49; and *infra*, § 21.

⁴ *Maryland v. Baldwin*, 112 U. S. 490. See also *Northman v. Wade*, 77 Georgia, 651.

¹⁷ *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778, 781.

⁵ *Wood v. Davis*, 18 How. 467; *Brown v. Murray Nelson & Co.*, 43 Fed. R. 614.

¹⁸ *Fitzgerald v. Missouri Pacific Ry. Co.*, 45 Fed. R. 812.

⁶ *Brown v. Murray Nelson & Co.*, 43 Fed. R. 614.

§ 18. ¹ *Blake v. McKim*, 103 U. S. 330.
² *Removal Cases*, 100 U. S. 457; *Barney v. Latham*, 103 U. S. 205; *Harter v. Kernochan*, 103 U. S. 562; *Maryland v. Baldwin*, 112 U. S. 490; *Wormley v. Wormley*, 8 Wheat. 421; *Taylor v. Holmes*, 14 Fed. R. 499. See *infra*, § 51.

⁷ *Sioux City & D. M. Ry. Co. v. Chicago, M. & St. P. Ry. Co.*, 27 Fed. R. 770.

⁸ *Removal Cases*, 100 U. S. 457, 468; *Pacific R. R. v. Ketchum*, 101 U. S. 289; *Barney v. Latham*, 103 U. S. 205; *Carson v. Hyatt*, 118 U. S. 279, 286; *Brown v. Murray Nelson & Co.*, 43 Fed. R. 614; *Anderson v. Bowers*, 40 Fed. R. 708.

county officers and holders of county bonds to enjoin payment of the bonds, the defendant officers are presumed to be on the same side of the controversy as the complainants.⁹

When at the time a bill is filed the court has no jurisdiction, jurisdiction cannot subsequently be conferred by an amendment striking out a party plaintiff who was properly and necessarily made such at the commencement of the suit;¹⁰ but in one case the court retained jurisdiction by allowing an amendment which made one of the original plaintiffs a defendant.¹¹ When they are not indispensable parties, jurisdiction may be retained upon a discontinuance or dismissal as regards defendants who are citizens of the same State as the plaintiff.¹²

19. Citizenship. — If there are no other grounds of jurisdiction, the Federal courts do not take cognizance of a controversy between two aliens;¹ or of one between a citizen of the District of Columbia,² or a citizen of a Territory, and a citizen of a State.³ A suit brought by a State against one of its own citizens, or against a citizen of another State, cannot, independently of other grounds, be maintained in a Federal court.⁴ If one of the parties sues or is sued as receiver,⁵ or as an executor or administrator,⁶ his own citizenship, not that of those whom he represents, is the test in determining the jurisdiction. When an infant sues by his next friend or special guardian, the citizenship of the infant alone is to be considered.⁷ A corporation is conclusively presumed to be composed of citizens of the State or nation which chartered it, or from which it derives its powers.⁸ A municipal corporation is treated as a citizen of the State within which it is situated.⁹ The same principle has been applied at circuit to an

¹ *Harter v. Kernochan*, 103 U. S. 562; *Anderson v. Bowers*, 40 Fed. R. 708.

² *Anderson v. Watt*, 138 U. S. 694.

³ *Conolly v. Taylor*, 2 Pet. 556.

⁴ *Beale v. Louisville, N. O. & T. R. Co.*, 39 Fed. R. 481, 484.

⁵ *Id.* ¹ *Mossman v. Higginson*, 4 Dall. 12; *Rateau v. Bernard*, 3 Blatchf. 244.

⁶ *Hopburn v. Ellzey*, 2 Cranch, 445; *Wesport v. Farfield*, Pet. C. C. 45; *Barney v. Baltimore*, 1 Hughes, 118.

⁷ *New Orleans v. Winter*, 1 Wheat, 91.

⁸ *Alabama v. Wolfe*, 18 Fed. R. 836.

⁹ *Davies v. Lathrop*, 12 Fed. R. 353; *Farlow v. Lee*, 2 C. C. R. 329.

¹⁰ *Bradford v. Williams*, 3 How. 576;

Coal Co. v. Blatchford, 11 Wall. 172;

Browne v. Browne, 1 Wash. 429; *Harper v. Norfolk & W. R. Co.*, 36 Fed. R. 102.

⁷ *Woodridge v. McKenna*, 8 Fed. R. 650.

⁸ *Louisville C. & C. R. R. Co. v. Letson*, 2 How. 497; *Marshall v. Baltimore & O. R. R. Co.*, 16 How. 314; *Muller v. Dows*, 94 U. S. 446; *Steamship Co. v. Tugman*, 106 U. S. 118. For an able criticism of these rulings, see the address of Hon. Alfred Russell before the American Bar Association in August, 1891 (25 *American Law Review*, 776, 795-803).

⁹ *Cowles v. Mercer County*, 7 Wall. 118.

unincorporated association authorized by statute to sue and be sued under the name of one of its officers.¹⁰ A corporation chartered by two or more States is usually treated for the purposes of jurisdiction as a citizen and resident of that one of them within whose limits the suit is brought;¹¹ but a different rule would seem to apply to a corporation formed by the consolidation of two or more corporations chartered by different States.¹² A national bank is deemed a citizen of the State in which it is located.¹³ The filing of a declaration of his intention to become a citizen of the United States does not terminate a party's alienage, although he is permitted by the laws of the State of his residence to vote and hold office.¹⁴ Residence is not conclusive evidence of citizenship.¹⁵ An exercise of the right of suffrage by a citizen

¹⁰ *Fargo v. L. N. A. & C. R. R. Co.*, 6 Fed. R. 787; *Whitman v. Hubbell*, 30 Fed. R. 81; *Maltz v. American Express Co.*, 3 Central L. J. 784; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566. *Contra*, *Dinsmore v. Phila. & R. Co.*, 3 Central L. J. 157; and see *Chapman v. Barney*, 129 U. S. 677.

¹¹ *O. & M. R. R. Co. v. Wheeler*, 1 Black, 286; *Railway Co. v. Whitton*, 13 Wall. 270; *Muller v. Dows*, 94 U. S. 444. See *Railroad Co. v. Harris*, 12 Wall. 65; *Graham v. B. H. & E. R. R. Co.*, 118 U. S. 161; *Pa. R. R. Co. v. St. L. A. & T. H. R. R. Co.*, 118 U. S. 290; *Nashua & Lowell R. R. Co. v. Boston & Lowell R. R. Co.*, 136 U. S. 356; *Fitzgerald v. Missouri Pac. Ry. Co.*, 45 Fed. R. 812; *Moore v. C. St. P. M. & O. R. R. Co.*, 21 Fed. R. 817; *C. St. P. M. & O. R. R. Co. v. Dakota Co.*, 28 Fed. R. 219; *Page v. Fall River W. & P. R. Co.*, 31 Fed. R. 257; *Johnson v. P. W. & B. R. R. Co.*, 1 Am. L. J. 457; *James v. St. Louis & S. F. Ry. Co.*, 46 Fed. R. 47; *Central Trust Co. v. St. Louis & S. T. Ry. Co.*, 41 Fed. R. 551.

¹² *Nashua & Lowell R. R. Co. v. Boston & Lowell R. R. Co.*, 136 U. S. 356. See *Paul v. Baltimore & O. R. R. Co.*, 44 Fed. R. 513.

¹³ 24 St. at L. ch. 373, § 4, p. 554; *First Nat. Bk. v. Forest*, 40 Fed. R. 705; *Farmers' Nat. Bank v. McElhinney*, 42 Fed. R. 80. See § 17.

¹⁴ *Lanz v. Randall*, 4 Dill. 425; *Maloy v. Duden*, 25 Fed. R. 673.

¹⁵ *Shelton v. Tiffin*, 6 How. 163, 185; *Reynolds v. Adden*, 136 U. S. 348, 352; *Kemna v. Brockhaus*, 5 Fed. R. 762, 763-764, 766-767; *per Dyer, J.* :—

"The general rule upon the subject of citizenship is well settled. It is that, 'in order to give jurisdiction to the courts of the United States, the citizenship of the party must be founded on a change of domicile, and permanent residence in the State to which he may have removed from another State. Mere residence is *prima facie* evidence of such change, although when it is explained and shown to have been for temporary purposes, the presumption is destroyed. The intention is to be collected from acts.' Lessee of *Butler v. Farnsworth*, 4 Wash. 101; 1 *Abbott* (U. S.) Pr. 211. 'If a citizen of one State think proper to change his domicile, and to remove himself and family . . . into another State, with a *bona fide* intention of abandoning his former place of residence, and to become an inhabitant or resident of the State to which he removes, he becomes, immediately upon such removal, accompanied with such intention, a resident citizen of that State within the meaning of the provision of the Constitution relative to the jurisdiction of the federal courts, and may maintain an action in the Circuit Court of the State which he has abandoned. . . . Time in relation to his new residence, occupation, a sudden removal back after instituting a suit, and the like, are circumstances

of the United States is conclusive evidence of his citizenship.¹⁶ Less evidence may, however, be sufficient to establish a change of citizenship.¹⁷ The fact that a plaintiff has changed his resi-

which may be relied upon to show that his first removal was not *bona fide* or permanent, but will not disprove his citizenship in the place of his new domicile, if the jury are satisfied that his first removal was *bona fide* and without an intention of returning.' *Cooper v. Galbraith*, 3 Wash. 564. 'If there has been an actual removal, with intent to make a permanent residence, and the acts of the party correspond with the purpose, the change of domicile is completed, and the law forces upon him the character of a citizen of the State where he has chosen his domicile.' *Butler v. Farnsworth*, *supra*. A temporary return to one's former place of residence, with views and for objects merely temporary, does not revive a former citizenship. *Burnham v. Rangely*, 1 Woodb. & M. 7. 'If the change of residence or citizenship is apparent only, and there has been, in fact, no change of residence, but only a transfer of apparent residence, *animo revertendi*, to give color of jurisdiction in a suit in the State of actual residence, it may not avail; but, where there is an actual change of residence and citizenship before suit brought, the motive to such change is not material, even if it was a desire to give capacity to sue in the courts of the United States.' *Pond v. The Vermont Valley R. Co.*, 12 Blatchf. 293. So, to effect a change of citizenship from one State to another, there must be an actual removal, an actual change of domicile, with a *bona fide* intention of abandoning the former place of residence and establishing a new one, and the acts of the party must correspond with such purpose." . . . "Since the question is one of mixed law and fact, and since so much may depend upon intention, in connection with the acts of the party and the circumstances of the case, it is some-

times difficult to determine when there has been such a change of domicile as destroys a former citizenship and establishes a new one. The plaintiff has testified, under objection, to the intentions and purposes of herself and husband. It is true, as argued, that intention is to be collected from acts, and therefore it is not competent for a party to prove his own declarations of intention, made before any acts done, in order to give character to his subsequent acts. But where acts *have been done*, such as actual removal from one place to another, it is, as I understand, competent in a case like this for the party to testify to his purpose and intention as connected with those acts, when they are brought in question, precisely as, in a case where fraud is charged, an actor in the transaction may be asked directly whether any fraud is intended. It is, of course, the duty of the court in such cases to scrutinize the acts, to see if they correspond with the alleged purpose. It is apparent that the circumstance of the plaintiff's return to Milwaukee in December was one, which, if unexplained, would tend to throw doubt upon the permanency of the alleged settlement in Minnesota. But if her return was for an object merely temporary, as she alleges, then her domiciliary *status* in that State would not be affected. Comment was made upon the fact that the plaintiff's husband pledged their household furniture and left it in the hands of a pawnbroker, at the time they removed to Minnesota, as a circumstance indicative of a purpose not to abandon their residence in Milwaukee. While the situation in which their furniture was placed has a bearing upon the pecuniary ability of the husband to engage in business, it has seemed to me that the fact that the

¹⁶ *Rahand v. D'Wolf*, 1 Paine, 589; *State Savings Assoc. v. Howard*, 31 Fed. R. 433; *McDonald v. Salem C. F. Mills Co.*, 31 Fed. R. 577.

¹⁷ *Shelton v. Tulin*, 6 How. 163, 185. For in a case where it was held that a pre-

vious statement in a bond, that a party was "of" Massachusetts, did not estop him from subsequently proving that he was then a citizen of New Hampshire, see *Reynolds v. Adden*, 136 U. S. 318.

dence for the purpose of bringing the suit in a Federal court does not divest the jurisdiction if the change has actually occurred.¹⁸ A change of citizenship, or a change of parties after the jurisdiction has once attached, will not divest it.¹⁹

§ 20. **Under Grants of Different States.** — Where one party claimed land under a grant of New Hampshire made when Vermont was a part of that State, and the other under a grant from Vermont made after their separation, it was held that the controversy arose between persons claiming land under grants of different States.¹ Where a controversy is founded upon conflicting grants of different States, the Federal courts have jurisdiction irrespective of the equitable title of the parties before either grant.²

§ 21. **Ancillary Jurisdiction.** — After a Federal court has acquired jurisdiction through the existence of the necessary difference of citizenship between the original parties, ancillary proceedings may be therein instituted, although parties upon the different sides of the controversy are citizens of the same State,

parties broke up housekeeping, stored their furniture and pawned it for money, which must have enabled them to remove from the State, tends rather to corroborate the claim that the removal was made with a view of establishing a permanent residence elsewhere, than otherwise. The plaintiff's home had always been in Milwaukee. Here her parents and family resided. Why should these acts be done unless there was a *bona fide* intention to remove to another State? The court cannot infer that they were done merely to enable her to begin this suit in this court, in the absence of any proof tending in that direction. To adopt the view taken by the learned counsel for the defendants, involves, as I conceive, the utter rejection of the plaintiff's testimony as quite unworthy of belief. I do not think it is sufficiently impeached to justify the court in so doing as to material matters whereof she speaks from avowed personal knowledge; and we have to settle the question upon the weight of credible evidence as it is now presented to the court. There was a breaking up by the parties of household life in Milwaukee. There was an actual removal to another State. There appears to have been an intention to re-

move to a fixed place in that State, followed by a change to another place, because of the failure of business projects. There was a continued residence in the alleged new domicile, and the testimony is that the return to the former domicile was for temporary purposes only. The place of business of the plaintiff's husband, according to the present showing, is in the State to which the parties have gone. And although the court might wish that the proof was more adequate and the circumstances more conclusive, I think upon the evidence, as it stands, it must be held that such a change of domicile was made, and such a new residence was acquired and established citizenship in another State."

¹⁸ *Briggs v. French*, 2 Sumner, 251, 255, 256; *Catlett v. Pacific Ins. Co.*, 1 Paine, 594; *Cooper v. Galbraith*, 3 Wash. C. C. 546, 553; *Case v. Clarke*, 5 Mason, 70; *Robertson v. Carson*, 19 Wall. 91, 106. But see *Morris v. Gilmer*, 129 U. S. 315.

¹⁹ *Ober v. Gallagher*, 93 U. S. 199, 206; *Stewart v. Dunham*, 115 U. S. 61, 64; *Phelps v. Oaks*, 117 U. S. 236.

§ 20. ¹ *Pawlet v. Clark*, 9 Cranch, 292; *Colson v. Lewis*, 2 Wheat. 377.

² *Colson v. Lewis*, 2 Wheat. 377, 379.

and there is no other ground of Federal jurisdiction.¹ "The question is not whether the proceeding is supplemental and ancillary, or is independent and original in the sense of the rules of equity pleading, but whether it is supplemental and ancillary, or is to be considered entirely new and original, in the sense which this court has sanctioned with reference to the line which divides the jurisdiction of the Federal courts from that of the State courts."² Thus, not only can a bill of revivor or a supplemental bill,³ or a cross-bill,⁴ be maintained in a Federal court which had jurisdiction of the original litigation, but so can a bill to restrain, or to regulate,⁵ or to set aside,⁶ or to obtain a judicial construction,⁷ or to enforce a judgment or decree of a Federal court.⁸ A bill for the reformation of a policy of insurance is ancillary to an action upon such policy.⁹ A creditor's bill between citizens of the same State founded upon a decree in admiralty has been held not within the jurisdiction of a Federal court.¹⁰ An original bill to foreclose a mortgage on a railway in the possession of a receiver appointed by a Federal court in a prior suit to foreclose a subsequent mortgage, can be brought in that Federal court independent of the citizenship of the parties, even after sale in the former suit.¹¹ It has been held at circuit that a bill cannot thus be sustained, irrespective of the citizenship of the parties when filed to set aside for fraud subsequent to its entry the decree of the Federal court or a contract affecting such decree.¹²

§ 21. ¹ *Dunn v. Clarke*, 8 Pet. 1; *Clarke v. Mathewson*, 12 Pet. 164; *Freeman v. Howe*, 24 How. 450, 460; *Minnesota Company v. St. Paul Company*, 2 Wall. 609; *Jones v. Andrews*, 10 Wall. 327; *Krippendorf v. Hyde*, 110 U. S. 276; *Pacific R. R. of Mo. v. Mo. P. R. R.*, 111 U. S. 505, 522; *Dewey v. W. F. G. C. Co.*, 124 U. S. 329; *Gumbel v. Pitkin*, 124 U. S. 131; *Seymour v. Phillips & C. Construction Co.*, 7 Biss. 460. But see *Christmas v. Russell*, 14 Wall. 69.

² *Miller, J.*, in *Minnesota Company v. St. Paul Company*, 2 Wall. 609, 633.

³ *Clarke v. Mathewson*, 12 Pet. 164.

⁴ *Morgan L. & T. R. R. & St. Co. v. Texas Central Ry. Co.*, 137 U. S. 171. See *infra*, § 172.

⁵ *Dunn v. Clarke*, 8 Pet. 1; *Freeman v. Howe*, 24 How. 450, 460; *Jones v. An-*

draws, 10 Wall. 327; *Krippendorf v. Hyde*, 110 U. S. 276; *Johnson v. Christian*, 125 U. S. 642.

⁶ *Pacific R. R. of Mo. v. Mo. P. R. R.*, 111 U. S. 505, 522; *Foster v. Mansfield, C. & L. M. R. Co.*, 36 Fed. R. 627.

⁷ *Minnesota Company v. St. Paul Company*, 2 Wall. 609.

⁸ *Railroad Companies v. Chamberlain*, 6 Wall. 748.

⁹ *Rosenbaum v. Council Bluffs Ins. Co.*, 37 Fed. R. 724; *Abraham v. North German F. Ins. Co.*, 37 Fed. R. 731.

¹⁰ *Winter v. Swinburne*, 8 Fed. R. 49. See *Provident Savings Society v. Ford*, 114 U. S. 635; *Metcalf v. Watertown*, 128 U. S. 586; *supra*, § 17.

¹¹ *Farmers' L. & Tr. Co. v. Houston & T. C. Ry. Co.*, 44 Fed. R. 115.

¹² *Yeatman v. Bradford*, 44 Fed. R. 536.

Conversely, there is a similar limitation upon the jurisdiction of the Federal courts. This is well explained in the following extract from an opinion by Bradley, J.: "The question presented with regard to the jurisdiction of the Circuit Court is, whether the proceeding to procure nullity of the former judgment in such a case as the present is or is not in its nature a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case. Otherwise, the Circuit Courts of the United States would become invested with power to control the proceedings in the State courts, or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in *Gaines v. Fuentes*,¹³ the case might be within the cognizance of the Federal courts. The distinction between the two classes of cases may be somewhat nice, but it may be affirmed to exist. In the one class there would be a mere revision of errors and irregularities, or of the legality and correctness of the judgments and decrees of the State courts; and in the other class, the investigation of a new case arising upon new facts, although having relation to the validity of an actual judgment or decree, or the party's right to claim any benefit by reason thereof."¹⁴ Proceedings supplementary to execution under the judgment of a State court authorized by State statutes against a judgment debtor or third persons cannot be instituted in or removed to the Federal courts, although a creditor's bill may be.¹⁵ A petition, after judgment in a State court, by plaintiff in ejectment to have the defendant's damages allowed to him, is a mere incident to the

¹³ 92 U. S. 10. See *Arrowsmith v. Poole v. Thatcher*, 19 Fed. R. 49; *Gleason*, 129 U. S. 86. *Buford v. Strother*, 3 McCrary, 253; s. c.

¹⁴ *Barrow v. Hutton*, 99 U. S. 80, 82. 10 Fed. R. 103; *Flash v. Dillon*, 22 Fed.

¹⁵ *Webber v. Humphreys*, 5 Dill. 223; R. 1.

ejectment suit, and the Federal courts can take no jurisdiction of it.¹⁶

§ 22. **Limitations upon Jurisdiction by Residence.**—The Judiciary Act of 1887 limits the jurisdiction of the Circuit Courts of the United States as follows: "But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."¹ A decision in the California circuit construed this act as depriving the Circuit Courts of all jurisdiction, whether originally or by removal, over foreign corporations or other persons who are inhabitants of other districts.² The other Circuit Courts, however, declined to follow this decision;³ and it was finally overruled by the judges who made it.⁴ The interpretation seems to be established that, when the jurisdiction depends upon the existence of a Federal question, or because a party is an alien, or upon grounds other than the citizenship of the parties, the defendant must be sued in the district which he inhabits;⁵ but when the jurisdiction depends upon the citizenship of the parties, none of whom are aliens, the suit may be brought in the district in which either the plaintiff or the defendant resides.⁶ Whether a corporation can have a residence

¹⁶ *Chapman v. Barger*, 4 Dill. 557.

§ 22. ¹ Act of March 3, 1887, § 1. 24 St. at L. 552; as amended, 25 St. at L. 434.

² *County of Yuba v. Pioneer Gold-Mining Co.*, 32 Fed. R. 183; *per Sawyer, Field & Sabin, JJ.* See also *Hardenberg v. Ray*, 33 Fed. R. 812, 814; *per Deady, J.*

³ *St. Louis V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. R. 385; *Pitkin County Min. Co. v. Markell*, 33 Fed. R. 386; *Fales v. Chicago, M. & St. P. Ry. Co.*, 32 Fed. R. 673; *Short v. Chi. M. & St. P. Ry. Co.*, 33 Fed. R. 114; *Gavin v. Vance*, 33 Fed. R. 84; *W. U. Tel. Co. v. Brown*, 32 Fed. R. 337.

⁴ *Wilson v. W. U. Tel. Co.*, 34 Fed. R. 561; *McCormick H. M. Co. v. Walthers*, 134 U. S. 41.

⁵ *McCormick H. M. Co. v. Walthers*, 134 U. S. 41, 43; *St. Louis V. & H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. R. 385, 386; *Meyer v. Herrera*, 41 Fed. R. 658.

⁶ *McCormick H. M. Co. v. Walthers*, 134 U. S. 41; *Pitkin Min. Co. v. Markell*, 33 Fed. R. 386; *D. Colorado v. Hallett, J.*; *St. Louis V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. R. 385, 386, S. D. Illinois; *per Gresham and Allen, JJ.*; *Fales v. Chicago, M. & St. P. Ry. Co.*, 32 Fed. R. 673, E. D. Iowa; *per Shiras, J.*; *Short v. Chicago, M. & St. P. Ry.*, 33 Fed. R. 114, D. Minnesota; *per Brewer, J.*; *Gavin v. Vance*, 33 Fed. R. 84, W. D. Tennessee; *per Hammond, J.*; *W. U. Tel. Co. v. Brown*, 32 Fed. R. 337, E. D. Missouri;

beyond the territory of the government from which it derives its charter is uncertain.⁷ It has been held at circuit that the non-resident defendant alone can object to the jurisdiction, because the suit is not brought in the proper district.⁸ This objection may be waived.⁹ Where a foreign corporation, as a condition of being allowed to transact business in Massachusetts, had filed a statutory agreement making the Commissioner of Corporations its attorney "upon whom all the lawful processes in any action or proceeding against said corporation in said Commonwealth may be served in like manner and with the same effect as if said corporation existed therein," it was held that it might then be sued in the Federal courts of Massachusetts.¹⁰ When one of the plaintiffs was a resident of the district, and the other plaintiff and the defendant, who were citizens of different States, were

per Brewer, J.; *Loomis v. N. Y. & C. Gas Coal Co.*, 33 Fed. R. 353, N. D. New York; *per* Coxe, J., *Wallace and Lacombe, JJ.*, concurring.

⁷ *Lacombe, J.*, *Filli v. Delaware, L. & W. R. Co.*, 37 Fed. R. 65, S. D. New York; *Hohorst v. Hamburg-American Packet Co.*, 38 Fed. R. 273, S. D. New York; and *National Typographic Co. v. New York Typographic Co.*, 44 Fed. R. 711, S. D. New York; *Ross, J.*, in *Denton v. International Co. of Mexico*, 36 Fed. R. 1, S. D. California; *Foster, J.* in *Purcell v. British Land & Mortgage Co. Limited*, 42 Fed. R. 465, D. Kansas; *Thayer, J.*, in *Bensinger Self-Adding Cash Register Co. v. National Cash Register Co.*, 42 Fed. R. 81, E. D. Missouri; *Shiras, J.*, in *Myers v. Murray, Nelson & Co.*, 43 Fed. R. 695, S. D. Iowa; *Bond, J.*, in *Henning v. Western Union Tel. Co.*, 43 Fed. R. 97, D. South Carolina; *Woods, J.*, in *Amsden v. Norwich Union Fire Ins. Co.*, 44 Fed. R. 515, D. Indiana; and *Mr. Justice Brewer*, when Circuit Judge, in *Booth v. St. Louis Fire-Engine Manuf. Co.*, 40 Fed. R. 1, E. D. Missouri, held that it cannot. *Maxey, J.*, in *Zambrino v. Galveston H. & S. A. Ry. Co.*, 38 Fed. R. 449, W. D. Texas; and *Scott v. Texas Land & Cattle Co., Limited*, 41 Fed. R. 225, W. D. Texas; *McKennan and Acheson, JJ.*, in *Riddle v. New York, L. E. & W. R. Co.*, 39 Fed. R. 290, W. D. Pennsylvania; *Mr. Justice*

Miller, in *Hirschl v. J. Kare Threshing Mach. Co.*, 42 Fed. R. 803, S. D. Iowa; *Deady, J.*, in *Miller v. Eastern Oregon Gold Min. Co.*, 45 Fed. R. 345, D. Oregon; and *Colt, J.*, in *Consolidated Store-Service Co. v. Lamson Consolidated Store-Service Co.*, 41 Fed. R. 833, D. Mass., held that a foreign corporation which transacts the principal part of its business in another State resides there, and cannot, on account of a difference of the citizenship between the parties to the controversy, remove a case to the Federal court. The same opinion is expressed by *Judge Speer, U. S. D. J.*, S. D. Georgia, in his *Removal of Causes*, p. 38. *Judge Shipman, U. S. D. J.*, D. Conn., appears to entertain the same view. See his opinion in *Overman Wheel Co. v. Pope Manuf. Co.*, 46 Fed. R. 577. See also *McCormick Harvesting Machine Co. v. Walthers*, 134 U. S. 41; and the address of *Hon. Alfred Russell* before the American Bar Association in August, 1891, 25 *American Law Review*, 776, 795, 803.

⁸ *Jewett v. Bradford Sav. Bank & Trust Co.*, 45 Fed. R. 801.

⁹ *Consolidated Store-Service Co. v. Lamson Consolidated Store-Service Co.*, 41 Fed. R. 833. See *infra*, §§ 94, 101.

¹⁰ *Consolidated Store-Service Co. v. Lamson Consolidated Store-Service Co.*, 41 Fed. R. 833, D. Mass., *per* *Colt, J.*

non-residents, it was held that the court had no jurisdiction.¹¹ The limitation as to residence does not apply as regards a part of the defendants, who are served by publication.¹² This statute does not affect the jurisdiction in admiralty.¹³ A special rule regulates proceedings under the Act to protect trade and commerce from unlawful restraints and monopolies.¹⁴ The Revised Statutes previously provided as follows: "When a State contains more than one district, every suit not of a local nature in the Circuit or District Courts thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides; but if there are two or more defendants, residing in different districts of the State, it may be brought in either district, and a duplicate writ may be issued against the defendants, directed to the marshal of any other district in which any defendant resides. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court of the proper district; and such original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded on as one suit; and upon any judgment or decree rendered therein, execution may be issued, directed to the marshal of any district in the same State."¹⁵ "In suits of a local nature, where the defendant resides in a different district, in the same State, from that in which the suit is brought, the plaintiff may have original and final process against him, directed to the marshal of the district in which he resides."¹⁶ "Any suit of a local nature, at law or in equity, where the land or other subject-matter of a fixed character lies partly in one district and partly in another, within the same State, may be brought in the Circuit or District Court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed, as fully as if the said subject-matter were wholly within the district for which such court is constituted."¹⁷ Prior to the act of 1887 special statutes regulated in this respect the Federal courts in the districts of Alabama, Georgia, Indiana, Iowa, Kentucky, Michigan, Missouri, Ohio, and Tennessee.¹⁸

¹¹ *Smith vs. Ligon*, 133 U. S. 315.

¹² *Ames v. Hollister*, 12 Fed. R. 341.
See also, § 107.

¹³ *In re Louisville Underwriters*, 134 U. S. 488.

¹⁴ 23 St. at L. 209. See Appendix.

¹⁵ U. S. R. S., § 740.

¹⁶ U. S. R. S., § 741.

¹⁷ U. S. R. S., § 742.

¹⁸ *Act passed*—23 St. at L. 18-19, after

Recent statutes also regulate the Federal courts in the north-eastern division of the southern district of Georgia, and the

dividing the Northern District of Alabama into Northern and Southern Divisions, provides : —

“§ 4. That all civil suits, not of a local character, which shall be hereafter brought in the circuit or district court of United States for the northern district of Alabama, in either of said divisions, against a single defendant, or where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside; but if there are two or more defendants, residing in different divisions, such suit may be brought in either division; and all mesne and final process, subject to the provisions of this act issued in either of said divisions, may be served and executed in either or both of the divisions.”

Georgia. — 21 St. at L. 62-63 (1st Supp. U. S. R. S. 507-508), after altering the boundaries of the Southern District of Georgia, and dividing it into Eastern and Western Divisions, provides that : —

“§ 4. All suits not of a local nature in the circuit and district courts against a single defendant, inhabitant of said State, must be brought in the division of the district where he resides; but if there are two or more defendants residing in different divisions of the district, such suits may be brought in either division. All issues of fact in said suits shall be tried at a term of the court held in the division where the suit is so brought.

“§ 5. Prosecutions for crimes or offences hereafter committed in either of the subdivisions shall be cognizable within such division; and all prosecutions for crimes or offences heretofore committed within either of said counties, taken as aforesaid from the northern district, or committed in the southern district as hitherto constituted, shall be commenced and proceeded with as if this act had not been passed.

“§ 6. Civil actions or proceedings now pending at Savannah in said southern district, which would under this act be brought in the western division of said district, may be transferred, by the con-

sent of all the parties, to said western division; and in case of such transfer, all papers and files therein, with copies of all journal entries, shall be transferred to the deputy clerk's office at Macon, and the same shall be proceeded with in all respects as though it was originally commenced in the western division.

“§ 7. In all cases of removal of suits from the courts of the State of Georgia to the courts of the United States in the southern district of Georgia, such removal shall be to the United States courts in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to, or is regulated by, the terms of the United States courts, shall be deemed to refer to the terms of the United States courts in such division.

“§ 8. All grand and petit jurors summoned for service in each division shall be residents of such division. All mesne and final process, subject to the provisions hereinbefore contained, issued in either of said divisions, may be served and executed in either or both of the divisions.”

Indiana. — U. S. R. S. § 743. “In the district of Indiana all actions of which the circuit and district courts have jurisdiction may be instituted in said courts, respectively, held at New Albany and Evansville, in the first instance, by filing the proper pleadings or other papers in the offices of the deputy clerks performing the duties of clerks of said courts respectively; and all proper and lawful process shall issue therefrom in the same manner as from other circuit and district courts in like cases.”

Iowa. — U. S. R. S. § 744. “In the district of Iowa all suits not of a local nature in the district court against a single defendant, inhabitant of such State, must be brought in the division of the district where he resides; but if there are two or more defendants, residing in different divisions of the district, such suits may be brought in either division, and duplicate writs may be sent to the other defend-

districts of Kansas, Kentucky, Louisiana, Minnesota, North Dakota, South Dakota, and Washington.¹⁹

ants. The clerk issuing the duplicate writ shall indorse thereon that it is a true copy of a writ sued out of the court in the proper division of the district; and the original and duplicate writs, when executed and returned into the office from which they issue, shall constitute and be proceeded in as one suit. All issues of fact in such suits shall be tried at a term of the court held in the division where the suit is so brought."

21 St. at L. 155 (1 Supp. U. S. R. S. 536): "§ 1. That the circuit court of the United States in and for the district of Iowa shall hereafter be held at the times and places provided by law for holding the United States district court in and for said district. Causes removed from any court of the State of Iowa into said circuit court within said district shall be removed to the circuit court in the division in which such State court is held, unless the parties thereto shall otherwise agree, or the court, for good cause, shall otherwise order.

"§ 2. That all civil suits not of a local nature which shall be hereafter brought in the circuit or district court of the United States in said district must be brought in the division of the district

where the defendant or defendants reside; but if there are two or more defendants residing in different divisions, the plaintiff may sue in either one of the divisions in which a defendant resides. All issues of fact triable in either of said courts shall be tried in the division where the defendant or one of the defendants resides, unless by consent of both parties the case shall be removed to some other division. Where the defendant is a non-resident of the district, suit may be brought in any division where property or the defendant is found."

Kentucky.—U. S. R. S. § 745. "In the district of Kentucky the clerks of the circuit and district courts, respectively, upon issuing original process in a civil action, shall make it returnable to the court nearest to the county of the residence of the defendant, or of that defendant whose county is nearest a court, if he have information sufficient, and shall immediately, upon payment by the plaintiff of his fees accrued, send the papers filed to the clerk of the court to which the process is made returnable; and whenever the process is not thus made returnable, any defendant may, upon motion, on or before the calling of the cause,

¹⁹ The act creating the northeastern division of the southern district of *Georgia* provides that "all civil suits not of a local nature must be brought in said northeastern division, where the defendant resides in said northeastern division of the Southern Federal judicial district of Georgia. But if there are two or more defendants, some residing in the northeastern division and others residing in any other portion of said southern district of Georgia, the action may be brought in any one of the divisions in which any one of the defendants resides. When the defendant is a non-resident of either division, action may, if plaintiff is a citizen of the district, be brought in that division where the defendant may be found. Cases removed from any of the courts of the State of Georgia to the circuit courts of the United States shall be removed to the circuit

court in the division in which said court is held." 25 St. at L. ch. 168, p. 671.

The act dividing the district of *Kansas* provides "that all civil suits not of a local character which shall be hereafter brought in either of said divisions against a single defendant, or where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside; but if there are two or more defendants residing in different divisions, such suit may be brought in either division, and all mesne and final process subject to the provisions of this act, issued in either of said divisions, may be served and executed in either or both of the divisions." 26 St. at L. ch. 403, § 2, p. 129.

The act creating the Owensborough division of the district of *Kentucky* pro-

§ 23. Special Limitation upon Jurisdiction of Circuit Court for Southern District of New York.—The Revised Statutes provide

have it transferred to the court to which it should have been sent had the clerk known the residence of the defendant when the action was brought."

Michigan.—20 St. at L. 175 (1 Supp. U. S. R. S. 375): "§ 1. That the counties of Chippewa, Schoolcraft, Marquette, Houghton, Keweenaw, Ontonagon, Isle Royale, Baraga, and Mackinaw, being and including all that portion of the territory and waters of said eastern district lying in the upper peninsula of Michigan, be, and the same are hereby detached from the eastern judicial district of Michigan, and attached to the western judicial district of said State.

"§ 2. That for the trial and determination of all causes and proceedings cognizable and triable in the circuit and district courts of the United States for the western district of Michigan as bounded and described in this act, the said district shall consist of two divisions known respectively as the southern and northern divisions of said district. The southern division shall comprise all that portion of said district lying and being in the lower peninsula of said State, and the northern division of said district shall comprise all the territory and waters of

the entire upper peninsula of said State; and there shall be two regular terms of the circuit and district courts begun and held in each of the divisions of said western district annually. The regular terms of the circuit and district courts in said southern division shall be held at the city of Grand Rapids, commencing on the first Tuesdays of March and October in each year. The regular terms of the circuit and district courts in said northern division shall be held at the city of Marquette, commencing upon the first Tuesdays of May and September in each year. And all issues of fact shall be tried at the terms of said courts to be held in the division where such suits shall hereafter be commenced; but nothing herein contained shall prevent the said circuit and district courts from regulating by general rule the venue of transitory actions, either at law or in equity, and from changing the same for cause.

"§ 3. That all suits and proceedings hereafter to be brought in the said circuit or district courts not of a local nature shall be brought in a court of the division of the district where the defendant resides. But if there be more than one defendant, and they reside in different

vides that "where one or more defendants in any civil cause shall reside in said division, and one or more defendants to such cause shall reside out of said division but in said district, then the plaintiff may institute his action either in the court having jurisdiction over the latter or in said division." 25 St. at L. ch. 792, § 2, p. 396.

The act dividing the eastern district of Louisiana into two divisions provides, "that if there be more than one defendant and they reside in different divisions of the district, the plaintiff may sue in either division, and send duplicate writ or writs to the other defendants, and the said writs, when executed and returned into the court from which they issued, shall constitute one suit and be proceeded in accordingly" (25 St. at L. ch. 869, § 3, p. 438); "that all causes triable in

either of the courts of said eastern district shall be tried in the division to which the process is returnable under the provisions of this act, unless by consent of all parties the cause be removed to some other division of said district." 25 St. at L. ch. 869, § 4, p. 438. "Causes removed from any court of the State of Louisiana in the circuit court of the United States within said eastern district shall be removed to the circuit court in the division in which such State is held." 25 St. at L. ch. 869, § 8, p. 438.

The act dividing the western district of Louisiana into two divisions provides, "that if there be more than one defendant and they reside in different divisions of the district, the plaintiff may sue in either division, and send duplicate writ or writs to the other defendants; and the said writs, when executed and re-

that "the original jurisdiction of the Circuit Court for the Southern District of New York shall not be construed to extend to

divisions of the district, the plaintiff may sue in either divisions and send duplicate writ or writs to the other defendants, on which the plaintiff or his attorney shall endorse that the writ thus sent is a copy of a writ sued out of a court of the proper division of the said district; and the said writs, when executed and returned into the office from which they issued, shall constitute one suit, and be proceeded in accordingly.

"§ 4. The clerk of the circuit and district courts for the western division of Michigan shall reside and keep his office at Grand Rapids, and shall also appoint a deputy clerk for said courts held at Marquette, who shall reside and keep his office at that place; and said deputy clerk shall keep in his office full records of all actions and proceedings in the said circuit and district courts for the northern division of said district held at that place, and shall have the same power to issue all processes from the said courts and perform any other duty that is or may be given to the clerks of other circuit and district courts in like cases.

"§ 5. That the district attorney and marshal of the said western district of Michigan shall respectively perform the

duties of district attorney and marshal for the southern and northern divisions of said district as established by this act. The marshal of said district shall keep an office and a deputy marshal at Marquette in the northern division of said district.

"§ 6. Any person charged with violating any of the penal or criminal statutes of the United States of which the said circuit or district courts have jurisdiction, shall be proceeded against by indictment or otherwise, within the division of said district where the alleged offence or offences shall be committed, and shall have his or her trial at a term of the said court held in said division, unless for cause shown, the judge shall otherwise direct; and one grand and one petit jury only shall be summoned, and serve in both said courts at each term thereof; and jurors shall be selected and drawn from the division of the said district in which they reside and in which the terms of the said circuit and district courts to which they are summoned are held.

"§ 7. This act shall not affect or in any wise interfere with causes of action now pending in the circuit and district courts for the eastern district of Michigan, but the same may be proceeded with

turned into the court from which they issued, shall constitute one suit and be proceeded in accordingly." 25 St. at L. ch. 789, § 2, p. 388. "That all causes triable in either of the courts of said western district, shall be tried in the division to which the process is returnable under the provisions of this act, unless, by consent of all parties, the cause be removed to some other division of said district." 25 St. at L. ch. 389, § 3, p. 388. "That causes removed from any court of the State of Louisiana into the circuit court of the United States within said western district, shall be removed to the circuit court in the division in which such State court is held." 25 St. at L. ch. 789, § 7, p. 388.

The act dividing the district of *Minnesota* into six divisions provides, "that, causes removed from any court in the

State of Minnesota into the circuit court shall be removed to the circuit court in the division in which said State court is held, and all civil suits not of a local nature must be brought in the division where the defendant or defendants reside; but if there are two or more defendants residing in different divisions, the action may be brought in any division in which a defendant resides; that all civil process from the circuit and district courts of the United States for said district of Minnesota against defendants residing or found therein shall be returned to the place appointed for the holding of said courts in the division where such defendant resides; that if there be more than one defendant, and they reside in different divisions of the district, the plaintiff may sue in either division, and send duplicate writ or writs

causes of action arising within the Northern District of said State.”¹ This does not exclude from the jurisdiction of the court

in the same manner as though this act had not been passed: Provided, however, That upon cause shown, the circuit and district courts for the eastern district may transfer civil causes arising in that portion of said district detached therefrom by this act to the circuit and district courts for the northern division of the western district of Michigan, provided for in this act. The circuit and district courts for the eastern district of Michigan shall continue to have the same jurisdiction in reference to all crimes and offences committed prior to the passage of this act in any portion of the State of Michigan by this act detached from said eastern district and attached to said western district.

“§ 8. All provisions of law in conflict with this act are hereby repealed.

“§ 9. There shall be one or more terms of the district court for the eastern district of Michigan, held annually at the United States court room in the city of Port Huron in said district, in the discretion of the judge of said district court, and at such times as he shall appoint therefor.”

Missouri. — 20 St. at L. 263 (1 Supp. U. S. R. S. 303): “§ 1. The western dis-

trict of Missouri is hereby divided into two divisions, which shall be known as the eastern and western divisions of the western district of Missouri. The western division shall include the counties of Andrew, Atchison, Barton, Bates, Buchanan, Caldwell, Carroll, Cass, Chariton, Clay, Clinton, Daviess, De Kalb, Gentry, Grundy, Harrison, Holt, Jackson, Jasper, La Fayette, Linn, Livingston, Mercer, Nodaway, Platte, Putnam, Ray, Saline, Sullivan, Vernon, and Worth; and a term of the district court and circuit of the United States for said district shall be held therein at the City of Kansas on the third Monday in May and the third Monday in October of each year. The remaining counties embraced in said district shall constitute the eastern division thereof, and the terms of the district and circuit courts of the United States for said district shall be held therein at the times and place now prescribed by law.

“§ 2. All offences hereafter committed in either of said divisions shall be cognizable and indictable within the division where committed; and all grand and petit jurors summoned for service in each division shall be inhabitants thereof. And all offences heretofore committed

to the other defendants, and the said writs, when executed and returned into the court from which they issued, shall constitute one suit and be proceeded in accordingly.” 26 St. at L. ch. 167, § 2, p. 72.

The act dividing the district of *North Dakota* provides, “that all civil suits not of a local character now pending, or which shall be brought in the district or circuit courts of the United States for the district of North Dakota in either of the said divisions against a single defendant, or where all the defendants reside in the same divisions of said district, shall be brought in the division in which the defendant or defendants reside, or if there are two or more defendants residing in different divisions, such suit may

be brought in either division, and all mesne and final process subject to the provisions of this act, issued in either of said divisions, may be served and executed in either or all of said divisions. All issues of fact in civil causes triable in any of the said courts shall be tried in the division where the defendant or one of the defendants reside, unless by consent of both parties the case shall be removed to some other division.” 26 St. at L. ch. 161, § 4, p. 68.

The act dividing the district of *South Dakota* provides, “that all civil suits not of a local nature must be brought in the division of the district where the defendant or defendants reside; but if there are two or more defendants residing in different divisions, the action may be brought

causes of action that arise without the State.² It has been held that this forbids the issue by that court of an injunction to pre-

within said district shall be prosecuted and tried as if this act had not passed.

"§ 3. All civil suits not of a local character which shall be hereafter brought in the district or circuit courts of the United States for the western district of Missouri in either of said divisions, against a single defendant, or where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside; but if there are two or more defendants residing in different divisions, such suit may be brought in either division, and all mesne and final process subject to the provisions of this act, issued in either of said divisions, may be served and executed in either or both of the divisions.

"§ 4. The clerks of the circuit and district courts for said district shall each appoint a deputy clerk at the place where their respective courts are required to be held, in the division, of the district in which such clerk shall not himself reside, each of whom shall, in the absence of the clerk, exercise all the powers and perform all the duties of clerk within the division for which he shall be appointed; Provided, That the appointment of such deputies shall be approved by the court for which they shall be respectively appointed, and may be annulled by such court at its pleasure. And the clerk shall be responsible for the official acts and neglects of all such deputies.

in either of the divisions in which a defendant resides." 26 St. at L. ch. 21, § 4, p. 14.

The act dividing the district of *Washington* provides, "that all civil suits not of a local character which shall be brought in the district or circuit courts of the United States for the district of Washington in either of the said divisions against a single defendant, or where all the defendants reside in the same division of said district, shall be brought in the division in which the defendant or defendants reside, or if there are two or more defendants residing in different di-

"§ 5. All civil suits and proceedings now pending in the circuit or district court of said western district of Missouri, and which would, if instituted after the passage of this act, be required to be brought in the western division of said district, may be transferred, by consent of all the parties, to said western division of said district, and there disposed of in the same manner and with like effect as if the same had been there instituted; And all process, writs, and recognizances relating to such suits and proceedings so transferred shall be considered as belonging to the term of the court in the western division of said district, in the same manner and with like effect as if they had been issued or taken in reference thereto originally."

Ohio.—20 St. at L. 101 (1 Supp. U. S. R. S. 338): "§ 1. That a term of the circuit court and district court for the northern district of Ohio shall be held at Toledo, in said State, on the first Tuesday of the months of June and December in each year; and one grand jury and one petit jury only shall be summoned, and serve in both of said courts at each term thereof. And the existing provisions of law fixing the times of holding the district court at Toledo are hereby repealed.

"§ 2. Said northern district shall be, and hereby is, divided into two divisions, to be known as the eastern and the western division of the northern district of

visions, such suit may be brought in either division, and all mesne and final process subject to the provisions of this act, issued in either of said divisions, may be served and executed in either or all of said divisions. All issues of fact in civil causes triable in any of the said courts shall be tried in the division where the defendant or one of the defendants reside, unless by consent of both parties the case shall be removed to some other division." 26 St. at L. ch. 65, § 4, p. 45.

§ 23. ² *Wheeler v. McCormick*, 8 Blatchf. 268.

vent the infringement of a patent when the sole previous cases of infringement occurred in the northern district of New York.³

Ohio. The western division shall consist of twenty-four counties, to wit; Williams, Defiance, Paulding, Van Wert, Mercer, Auglaize, Allen, Putnam, Henry, Fulton, Lucas, Wood, Hancock, Hardin, Logan, Union, Delaware, Marion, Wyandot, Seneca, Sandusky, Ottawa, Erie, and Huron; and the eastern division shall consist of the remaining counties in said district. But no additional clerk or marshal shall be appointed in said district.

"§ 3. All suits not of a local nature in the circuit and district courts, against a single defendant, inhabitant of such State, must be brought in the division of the district where he resides; but if there are two or more defendants, residing in different divisions of the district, such suits may be brought in either division. All issues of fact in such suits shall be tried at a term of the court held in the division where the suit is so brought."

"§ 6. . . . All mesne and final process, subject to the provisions hereinbefore contained, issued in either of said divisions, may be served and executed in either or both of the divisions. . . ."

21 St. at L. 63 (1 Supp. U. S. R. S. 508, 509): "§ 1. That the counties of Union, Delaware, Morrow, Knox, Coshocton, Harrison, and Jefferson, heretofore composing a part of the northern district of Ohio, be transferred to, and henceforth form a part of, the southern district of Ohio.

"§ 2. A term of the circuit court and of the district court for the southern district of Ohio shall be held at Columbus in said State on the first Tuesday of the months of June and December in each year.

"§ 3. Said southern district shall be, and hereby is, divided into two divisions, to be known as the eastern and the western division of the southern district of Ohio. The eastern division shall consist of twenty-nine counties, to wit: Union, Delaware, Morrow, Knox, Coshocton, Harrison, Jefferson, Madison, Fayette, Franklin, Pickaway, Ross, Pike, Gallia,

Jackson, Meigs, Vinton, Athens, Hocking, Fairfield, Licking, Perry, Muskingum, Morgan, Washington, Noble, Monroe, Belmont, and Guernsey; and the western division shall consist of the remaining counties in said district. But no additional clerk or marshal shall be appointed in said district.

"§ 4. All suits not of a local nature in the circuit and district courts against a single defendant, inhabitant of said State, must be brought in the division of the district where he resides; but if there are two or more defendants residing in different divisions of the district, such suits may be brought in either division. All issues of fact in said suits shall be tried at a term of the court held in the division where the suit is so brought."

"§ 7. . . . All mesne and final process subject to the provisions hereinbefore contained issued in either of said divisions may be served and executed in either or both of the divisions.

"§ 8. In all cases of removal of suits from the courts of the State of Ohio to the courts of the United States in the southern district of Ohio, such removal shall be to the United States courts in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of the United States courts, shall be deemed to refer to the terms of the United States courts in such division."

Tennessee. — 21 St. at L. 751 (1 Supp. U. S. R. S. 548): "§ 1. That the county of Grundy, heretofore composing a part of the middle district of Tennessee, be transferred to, and henceforth form a part of, the eastern district of Tennessee.

"§ 2. A term of the circuit court and of the district court for the eastern district of Tennessee shall be held at Chattanooga in said State in each year on the first Mondays of April and October, after the passage of this act.

"§ 3. Said eastern district shall be

³ *Black v. Thorne*, 10 Blatchf. 66.

§ 24. **Suits by Assignees.**— The statutes further limit the jurisdiction of the courts of the United States by providing that no Circuit or District Court shall “have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other *chose in action* in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.”¹ A check is a bill of exchange.² A draft drawn in one on another of the United States is a foreign bill of exchange.³ A promissory note payable “to the order of —” is equivalent to a promissory note payable to bearer.⁴ A bill of exchange drawn by a corporation in favor of itself and by it indorsed in blank is payable to bearer

and hereby is divided into two divisions, to be known as the northern and southern divisions of the eastern district of Tennessee; the southern division shall consist of the following counties, to wit: Hamilton, James, Polk, McMinn, Bradley, Meigs, Rhea, Marion, Sequatchie, Bledsoe, Grundy, and Cumberland, and the northern division shall consist of the remaining counties in said district. But no additional clerk or marshal shall be appointed in said district.

“§ 4. That the clerks of the district and circuit courts for the eastern district of Tennessee, and the marshal and district attorney for said district, shall perform the duties appertaining to their offices respectively for said courts. And the said clerks and marshals shall each appoint a deputy to reside and keep their offices in the city of Chattanooga, and who shall, in the absence of their principals, do and perform all the duties appertaining to their offices respectively.

“§ 5. All suits not of a local nature in the circuit and district courts against a single defendant, inhabitant of said State, must be brought in the division of the district where he resides; but if there are two or more defendants residing in different divisions of the district, such suits may be brought in either division. All issues of fact in said suits shall be tried at a term of the court held in the division where the suit is so brought.”

“§ 7. . . . All mesne and final process subject to the provisions hereinbefore contained, issued in either of said divisions, may be served and executed in either or both of the divisions.

“§ 8. In all cases of removal of suits from the courts of the State of Tennessee to the courts of the United States in the eastern district of Tennessee, such removal shall be to the United States courts in the division in which the county is situated from which the removal is made; and the time within which the removal shall be perfected, in so far as it refers to or is regulated by the terms of the United States courts, shall be deemed to refer to the terms of the United States courts in such division.

“§ 9. That each of said courts shall be held in a building to be provided for that purpose by the State or municipal authorities and without expense to the United States.

“§ 10. This act shall be in force from and after the first day of July anno Domini eighteen hundred and eighty; and all acts and parts of acts inconsistent herewith are hereby repealed.”

§ 24. ¹ Act of March 3, 1887, § 1; 24 St. at L. 552.

² Bull v. Bank of Kasson, 123 U. S. 105.

³ Buckner v. Finley, 2 Pet. 586, 593.

⁴ Steel v. Rathburn, 42 Fed. R. 390.

within the meaning of the statute.⁵ A county is a corporation within the meaning of the statute.⁶ The holder of a draft which has been accepted by the drawee, who is a citizen of a different State from himself, can sue the latter in the Federal court, irrespective of the citizenship of the drawer.⁷ It has been said that "the clause 'if such instrument be payable to bearer, and not made by any corporation' operates as an exception to the general rule, and gives the Federal courts jurisdiction of those suits by assignees, where the action is founded on an obligation made by a corporation, that is payable to bearer, and is negotiable by mere delivery;"⁸ and that "the exceptions, aside from suits on foreign bills of exchange, are limited to suits on promissory notes and other *choses in action*, where the demand sought to be enforced is represented by an instrument in writing, payable to bearer and not made by a corporation, the words following the designation of *choses in action* indicating the manner in which they are to be shown, they must be such as arise upon contracts of the original parties."⁹ The phrase "suit to recover the contents of a *chose in action*" includes suits to recover debts, or any claims for damages for breach of contract, or for torts connected with contract.¹⁰ The phrase also includes suits to foreclose mortgages,¹¹ and to enforce the specific performance of contracts.¹² Such is an action to recover upon a contract of insurance and for a reformation of the policy.¹³ The phrase does not include a suit of replevin¹⁴ or ejectment,¹⁵ or otherwise brought to recover property taken by the defendant before the assignment of the title to the plaintiff;¹⁶ nor a suit to recover damages for the conversion of personal property;¹⁷ nor a suit in equity to compel the transfer of stock on the books of a corporation;¹⁸ nor a suit upon a judg-

⁵ Bank of British N. A. v. Barling, 46 Fed. R. 357.

⁶ Rollins v. Chaffee County, 34 Fed. R. 91; Wilson v. Knox County, 43 Fed. R. 481.

⁷ Superior City v. Ripley, 138 U. S. 93.

⁸ Mr. Justice Miller in Wilson v. Knox County, 43 Fed. R. 481, 482.

⁹ Mr. Justice Field in Ambler v. Eppinger, 137 U. S. 480, 482.

¹⁰ Bushnell v. Kennedy, 9 Wall. 387; 390; Sere v. Pitot, 6 Cranch, 332, 335, 336; Sheldon v. Gill, 8 How. 441, 449, 450; Tredway v. Sanger, 107 U. S. 323, 325; Mersman v. Werges, 112 U. S. 139,

143; Corbin v. County of Black Hawk, 105 U. S. 659, 665, 666.

¹¹ Sheldon v. Gill, 8 How. 441.

¹² Corbin v. County of Black Hawk, 105 U. S. 659, 665; Shoecraft v. Bloxham, 124 U. S. 730.

¹³ Laird v. Indemnity Mut. Ma. Co., 44 Fed. R. 712.

¹⁴ Deshler v. Dodge, 16 How. 622, 631.

¹⁵ Smith v. Kernochen, 7 How. 198.

¹⁶ Gest v. Packwood, 39 Fed. R. 525.

¹⁷ Ambler v. Eppinger, 137 U. S. 480.

¹⁸ Jewett v. Bradford S. B. Tr. Co., 45 Fed. R. 801.

ment, though the suit in which the judgment was recovered could not have been brought in a Federal court.¹⁹ It has been held that the assignee of a judgment cannot sue in a Federal court to enforce it unless his assignor could have sued there.²⁰ It has been suggested that the restriction applies only to contracts "which may be properly said to have contents," not to "mere naked rights of action founded on some wrongful act,—some neglect of duty to which the law attaches damages," such as a failure to protest a note; but to "rights of action founded on contracts which contain within themselves some promise or duty to be performed."²¹ It has been held that an indorsee, who is a citizen of the same State as the maker of the note, may sue his immediate indorser in a Federal court, if that indorser be a citizen of a different State;²² but that when, in a suit against a remote indorser the plaintiff derives his title through a citizen of the same State as the defendant, there is no jurisdiction, on account of the difference of citizenship between the latter and the plaintiff;²³ and that the person who has advanced money upon an accommodation note can sue the maker, if a citizen of a different State, in a Federal court, although the indorser is a citizen of the same State.²⁴ Assignees in insolvency²⁵ are included within this restriction; but receivers²⁶ and executors and administrators²⁷ are not. A party who claims by subrogation is not within this restriction.²⁸ It has been held that the restriction does not apply when the only reason why the assignor could not have sued was that his claim was less in value than the jurisdictional amount.²⁹ The assignee must aver in his pleading that his assignor might have sued in the Federal court.³⁰

¹⁹ *Bean v. Smith*, 2 Mason, 252, 269; 4 Dall. 8; *Mollan v. Torrance*, 9 Wheat. 537, 538. *Ober v. Gallagher*, 93 U. S. 199, 206. But see *Metcalf v. Watertown*, 128 U. S. 586; *Mississippi Mills v. Cohn*, 39 Fed. R. 865.

²⁰ *Metcalf v. Watertown*, 128 U. S. 586; *Mississippi Mills v. Cohn*, 39 Fed. R. 865.

²¹ *Barney v. Globe Bank*, 5 Blatch 107. See, however, *Bushnell v. Kennedy*, 9 Wall. 387, 391; *Ambler v. Eppinger*, 137 U. S. 480, 483.

²² *Young v. Bryan*, 6 Wheat. 146; *Manufacturing Co. v. Bradley*, 105 U. S. 175.

²³ *Turner v. Bank of North America*,

²⁴ *Goldsmith v. Holmes*, 33 Fed. R. 484.

²⁵ *Sere v. Pitot*, 6 Cranch, 332, 339.

²⁶ *Davies v. Lathrop*, 12 Fed. R. 353.

²⁷ *Sere v. Pitot*, 6 Cranch, 332, 339; *Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Childras v. Emory*, 8 Wheat. 642.

²⁸ *New Orleans v. Gaines' Administrator*, 138 U. S. 595, 606.

²⁹ *Bernheim v. Birnbaum*, 30 Fed. R. 885, 887. See also *Hammond v. Cleaveland*, 23 Fed. R. 1.

³⁰ *Parker v. Ormsby*, 141 U. S. 81.

§ 25. Jurisdiction of the District Courts of the United States. —

The jurisdiction of the District Courts of the United States in civil causes extends to suits for penalties and forfeitures incurred under any law of the United States, including the contract labor law;¹ suits at common law brought by the United States or any officer thereof authorized by law to sue, including a receiver of a national banking association appointed by the comptroller;² suits in equity to enforce the lien of the United States upon any real estate for any internal revenue tax, or to subject to the payment of any such tax any real estate owned by the delinquent, or in which he has any right, title, or interest; suits for the recovery of any forfeiture or damages under Section 3490 of the Revised Statutes; causes of action arising under the postal laws of the United States; civil causes of admiralty and maritime jurisdiction, and all seizures on land and water not within admiralty and maritime jurisdiction; prizes on land and water; suits brought by the assignees of debentures for drawback of duties to enforce such debentures; all suits under the civil rights laws; suits to recover possession of any office except that of presidential elector, or a legislative office, wherein the sole question touching the title to such office arises out of the denial of the right of a citizen to vote on account of race, color, or previous condition of servitude; proceedings by *quo warranto*, prosecuted by a district attorney of the United States, for the removal from office of a person disqualified by the Fourteenth Amendment to the Constitution; suits by aliens for torts only in violation of the law of nations or of a treaty of the United States; suits against consuls or vice-consuls; and all matters and proceedings in bankruptcy;³ suits against the United States to collect claims not exceeding one thousand dollars for money only, founded upon the Constitution of the United States or on any law of Congress, except for pensions, or upon any contract expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the plaintiff would be entitled to redress against the United States in a court of law, equity or admiralty, if the United States were suable, except war claims which, before March 3,

§ 25. ¹ United States v. Whitecomb M. B. Co., 45 Fed. R. 89.

³ U. S. R. S. § 563. See United States v. Mooney, 116 U. S. 104.

² Stephens v. Bernays, 44 Fed. R. 642.

1887, were rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same; ⁴ and proceedings to condemn for national public purposes land situated within their respective districts.⁵

§ 26. **Territorial Jurisdiction and Terms of the Supreme Court, Circuit Courts of Appeal, Circuit and District Courts of the United States.**—The Supreme Court has jurisdiction throughout the United States. It holds one term annually at Washington, commencing on the second Monday of October.¹ It may also hold adjourned and special terms.² In case of a contagious or epidemic disease, a term may be held at another place.³

The territorial jurisdiction of the Circuit Courts of Appeal is as follows: The first circuit includes the districts of Rhode Island, Massachusetts, New Hampshire, and Maine.⁴ The second circuit includes the districts of Vermont, Connecticut, and New York.⁵ The third circuit includes the districts of Pennsylvania, New Jersey, and Delaware.⁶ The fourth circuit includes the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.⁷ The fifth circuit includes the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.⁸ The sixth circuit includes the districts of Ohio, Michigan, Kentucky, and Tennessee.⁹ The seventh circuit includes the districts of Indiana, Illinois, and Wisconsin.¹⁰ The eighth circuit includes the districts of Colorado, Arkansas, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming.¹¹ The ninth circuit includes the districts of Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington.¹² The term of the Circuit Court of Appeals for the first circuit is held annually in the city of Boston on the first Tuesday of October; the term of the Circuit Court of Appeals for the second circuit is held annually in the city of New York on the last Tuesday of

¹ 24 St. at L. 505; *United States v. Jones*, 131 U. S. 1.

² 25 St. at L. ch. 728, p. 357. See *infra*, § 281.

³ 26. ¹ U. S. R. S. § 684.

⁴ U. S. R. S. §§ 684-686.

⁵ U. S. R. S. § 4799.

⁶ U. S. R. S. § 604.

⁷ U. S. R. S. § 604.

⁸ U. S. R. S. § 604.

⁹ U. S. R. S. § 604.

⁸ U. S. R. S. § 604.

⁹ U. S. R. S. § 604.

¹⁰ U. S. R. S. § 604.

¹¹ U. S. R. S. § 604; 25 St. at L. ch. 180, § 21; 139 U. S. 707; 26 St. at L. ch. 517, § 15, p. 830.

¹² U. S. R. S. § 604; 25 St. at L. ch. 180, § 21; 26 St. at L. ch. 517, § 15, p. 830; 139 U. S. 707; 26 St. at L. ch. 656, § 16, p. 217.

October; the term of the Circuit Court of Appeals for the third circuit is held annually in the city of Philadelphia on the third Tuesday of March and the third Tuesday of September; the term of the Circuit Court of Appeals for the fourth circuit is held annually in the city of Richmond, on the Tuesday after the first Monday of February; the term of the Circuit Court of Appeals for the fifth circuit is held annually in the city of New Orleans on the third Monday of November; the term of the Circuit Court of Appeals for the sixth circuit is held annually in the city of Cincinnati on the first Monday of October; the term of the Circuit Court of Appeals for the seventh circuit is held annually in the city of Chicago on the first Monday of October; the term of the Circuit Court of Appeals for the eighth circuit is held annually in the city of St. Louis on the second Monday of October; the term of the Circuit Court of Appeals for the ninth circuit is held annually in the city of San Francisco on the first Monday of October.

There is a Circuit Court in each judicial district of the United States.¹³

When one term begins the preceding term ends, unless it was the evident intention of the statutes that the two terms should be concurrent in whole or in part.¹⁴ There is a District Court in each judicial district of the United States.

The judicial districts and the terms of the Circuit and District Courts held therein are as follows:—

In *Alabama*, three districts, — the Southern, Middle, and Northern. The Southern District of Alabama includes the counties of Mobile, Washington, Baldwin, Clarke, Marengo, Wilcox, Monroe, and Conecuh.¹⁵ The terms for this district of both the Circuit and District Courts are held at the city of Mobile on the fourth Monday of November and the first Monday in May.¹⁶ A Circuit and a District Court for the Middle District of Alabama are held at the city of Montgomery. This includes the counties of Montgomery, Autauga, Coosa, Tallapoosa, Chambers, Randolph, Macon, Russell, Barbour, Pike, Henry, Dale, Coffee, Covington, Lowndes, Dallas, Perry, and Butler. The terms of the Circuit

¹³ U. S. R. S. § 608; 18 St. at L. 195; 25 St. at L. ch. 113, p. 655; 25 St. at L. ch. 180, p. 682.

¹⁵ U. S. R. S. §§ 532, 608; Act of June 22, 1874, ch. 401, § 5; 18 St. at L. 195; U. S. R. S. 1st Supp. pp. 87, 88; Act of May 2, 1884, ch. 38; 23 St. at L. 18.

¹⁴ *Ex parte* Friday, 43 Fed. R. 916, 918.

¹⁶ 26 St. at L. 180.

and District Courts for this district are held at the city of Montgomery on the first Mondays of May and November.¹⁷

There is a Circuit and a District Court for the Northern District, which includes the remainder of the State. This district is divided into two divisions.

The Southern Division of the Northern District contains the counties of Sumter, Greene, Hale, Pickens, Tuscaloosa, Lamar, Fayette, Walker, Jefferson, Blount, Bibb, Shelby, Saint Clair, Etowah, Calhoun, Cleburne, Clay, Talladega, Cherokee, and De Kalb, in which the court is held at Birmingham.¹⁸

In this division of the Northern District, terms of both Circuit and District Courts are held at the city of Birmingham on the first Mondays of March and September.¹⁹ The Northern Division of the Northern District includes the remaining counties in it, and both the Circuit and District Courts are held in this division at the city of Huntsville on the first Monday of April and the second Monday of October.²⁰

In *Arkansas*, two districts, — the Eastern and Western. The Western District of Arkansas includes the counties of Benton, Washington, Crawford, Sebastian, Scott, Polk, Montgomery, Yell, Logan, Franklin, Johnson, Madison, Newton, Carroll, Boone, and Marion, and formerly included "what is known as the Indian Territory." Terms of the Circuit and District Courts are held at Fort Smith on the first Mondays in February, May, August, and November.²¹

The Eastern District includes the residue of the State,²² and is divided into Eastern and Western Divisions. The Eastern Division of the Eastern District consists of the counties of Mississippi, Crittenden, Lee, Phillips, Clay, Craighead, Poinsett, Greene, Cross,

¹⁷ U. S. R. S. §§ 532, 608; Act of June 22, 1874, ch. 491, § 6, *supra*; Act of May 2, 1884, ch. 38, *supra*.

¹⁸ U. S. R. S. §§ 532, 608; 18 St. at L. 195, § 5 (Act of June 22, 1874, ch. 491); U. S. R. S. 1st Supp. pp. 87, 88; Act of May 2, 1884, ch. 38 (23 St. at L. 18).

¹⁹ Act of May 2, 1884, ch. 38, § 2 (23 St. at L. 18).

²⁰ Act of May 2, 1884, ch. 38, § 2 (23 St. at L. 18); Act of June 22, 1874, ch. 572, 401, §§ 1, 6, *supra*.

²¹ U. S. R. S. §§ 608, 533, as amended by 18 St. at L. ch. 41, p. 223; U. S. R. S.

1st Supp. 262; 24 St. at L. ch. 422, p. 83; 25 St. at L. ch. 113, p. 655. For special jurisdiction of the courts held in this district over controversies affecting the Gulf, Colorado & Santa Fé Railroad Company, and the Southern Kansas Railway Company, see 23 St. at L. ch. 177, § 8, p. 72; 23 St. at L. ch. 179, § 8, p. 75. *Briscoe v. Southern Kan. Ry. Co.*, 40 Fed. R. 273. As to Indian Territory, see 25 St. at L. p. 786.

²² Act of Jan. 31, 1877, ch. 41 (19 St. at L. 230); U. S. R. S. 1st Supp. pp. 262, 273, amending U. S. R. S. §§ 531, 571, 572.

Saint Francis, and Monroe; and the Western Division of the remaining counties of the district.²³ A term of the Circuit and District Court for this district in the Eastern Division is held at Helena on the second Mondays of March and October, and in the Western Division a Circuit Court is held at Little Rock on the first Mondays of April and October.²⁴ By a recent statute, "The Texarkana Division of the Eastern Judicial District of Arkansas" is established, in which terms of Circuit and District Courts of this district are to be held at Texarkana on the third Mondays of May and November, and which includes the counties of Columbia, Howard, Hempstead, Lafayette, Little River, Miller, Nevada, Ouachita, Pike, and Sevier.²⁵

In *California*, two districts, — the Northern and the Southern. The Southern District of California contains the counties of San Diego, San Bernardino, Los Angeles, Ventura, Santa Barbara, San Luis Obispo, Fresno, Tulare, and Kern. The remainder of California is comprised in the Northern District. In the Southern District terms of Circuit and of District Courts respectively are held at Los Angeles on the second Monday of August and the second Monday of January. In the Northern District terms of both Circuit and District Courts are held at San Francisco on the first Monday in February, the second Monday in July, and the fourth Monday in November.²⁶ Prior to the division of the original district of California, provision was made for holding special sessions of the Circuit Court.²⁷

Colorado constitutes one judicial district.²⁸ Terms of Circuit and District Courts for this district are held at Denver on the first Tuesdays in May and November, at Pueblo on the first Tuesday in April, and at Del Norte on the first Tuesday in August.²⁹

Connecticut constitutes one judicial district.³⁰ District Courts are held at New Haven on the fourth Tuesday in February, at

²³ U. S. R. S. § 533; 24 St. at L. 406.

²⁴ Act of Feb. 17, 1887, ch. 139 (24 St. at L. 406); U. S. R. S. § 572, as amended by Act of Jan. 31, 1877, ch. 41 (19 St. at L. 230; U. S. R. S. 1st Supp. 262, 263).

²⁵ Act of Feb. 28, 1887 (24 St. at L. 428); Act of March 7, 1890 (26 St. at L. 17).

²⁶ Act of Aug. 5, 1886, ch. 928 (24 St. at L. 308-310), superseding in this respect

U. S. R. S. §§ 531, 572, 658, act of June 15, 1874, ch. 287, and act of Feb. 18, 1876, ch. 6.

²⁷ U. S. R. S. § 664, and compare with it the act of Aug. 5, 1886, ch. 920.

²⁸ Act of June 26, 1876, ch. 147 (19 St. at L. 61; U. S. R. S. 1st Supp. 215, 216).

²⁹ Act of Aug. 3, 1886, ch. 848 (24 St. at L. 214).

³⁰ U. S. R. S. § 531.

Hartford on the fourth Tuesday in May, at New Haven on the fourth Tuesday in August,³¹ and at Hartford on the first Tuesday of December.³² A Circuit Court for this district is held at New Haven on the fourth Tuesday in April, and at Hartford on the third Tuesday in September.³³

Delaware constitutes one judicial district.³⁴ The District Court is held at Wilmington on the second Tuesdays in January, April, June, and September.³⁵ The Circuit Court is held at Wilmington on the third Tuesdays in June and October.³⁶

In *Florida*, two districts,—the Northern and Southern. The Southern District embraces the counties of Hernando, Hillsborough, Polk, Manatee, and Monroe, the remaining territory constituting the Northern District.³⁷ In the Southern District, Circuit and District Courts are held at Tampa on the second Monday in February.³⁸ A Circuit³⁹ and District⁴⁰ Court for this district is also held at Key West on the first Mondays of May and November. In the Northern District, both the District and Circuit Courts are held at Tallahassee on the first Monday in February, at Pensacola on the first Monday in March, and at Jacksonville on the first Monday in December.⁴¹

In *Georgia*, two districts,—the Northern and Southern. The northern district of Georgia originally included the counties of Troup, Meriwether, Pike, Butts, Jasper, Morgan, Green, Taliaferro, Wilkes, and Lincoln as they existed Aug. 11, 1848, with all the counties north of them. Pike, Butts, Jasper, Lincoln, Wilkes, and Taliaferro have since been annexed to the southern district. The Western Division of the Northern District has recently been constituted. It consists of the counties of Muscogee, Heard, Troup, Meriwether, Harris, Talbot, Taylor, Marion, Chattahoochee, Stewart, Schley, Webster, Quitman, Clay, Randolph, Early, Miller, and Terrell. The Southern District is divided into Eastern, Northeastern, and Western Divisions. The Western Division consists of the following counties: Bibb, Monroe, Jones, Twiggs, Houston, Crawford, Baldwin, Wilkinson, Laurens, Pu-

³¹ U. S. R. S. § 572.

³² Act of June 30, 1879, ch. 49 (21 St. at L. 41; U. S. R. S. 1st Supp. 497).

³³ U. S. R. S. § 658.

³⁴ U. S. R. S. § 531.

³⁵ U. S. R. S. § 572.

³⁶ U. S. R. S. § 658.

³⁷ Act of Feb. 3, 1879, ch. 43 (20 St. at

L. 280; U. S. R. S. 1st Supp. 407), superseding U. S. R. S. § 534.

³⁸ Act of June 30, 1886, ch. 581 (24 St. at L. 106), repealing part of the act of Feb. 3, 1879, *supra*.

³⁹ U. S. R. S. § 658.

⁴⁰ U. S. R. S. § 572.

⁴¹ U. S. R. S. §§ 572, 658.

laski, Dooly, Macon, Upson, Pike, Butts, Jasper, Putnam, Hancock, Warren, Dodge, Wilcox, Telfair, Sumter, Lee, Terrell, Calhoun, Dougherty, Baker, and Mitchell.⁴² The Eastern Division consists of the remaining counties of the district.⁴³ The counties of Warren, Glascock, McDuffie, Columbia, Richmond, Burke, Jefferson, Johnson, Washington, Lincoln, Wilkes, and Taliaferro compose the Northeastern Division.⁴⁴ In the Northern District terms of both courts are held at Atlanta on the second Monday in March and on the first Monday in October,⁴⁵ and at Columbus, Muscogee County, on the second Mondays of January and June, for two weeks.⁴⁶ In the Southern District terms of the District Court are held at Savannah on the second Tuesdays in February, May, August, and November,⁴⁷ and of the Circuit Court on the second Monday of April and the Thursday after the first Monday in November;⁴⁸ at Macon, of both courts on the first Mondays of May and October,⁴⁹ and at Augusta of both courts on the first Monday of April and the third Monday of November.⁵⁰

Idaho constitutes one judicial district. The Circuit and District Courts are held at the capital of the State for the time being on the first Mondays of April and November of each year.⁵¹

In *Illinois*, two districts,—the Northern and Southern. The Northern District of Illinois includes the counties of McDonough, Henderson, Warren, Fulton, Knox, Peoria, Tazewell, Woodford, Livingston, and Iroquois, with all the counties north of them. The Southern District of Illinois includes the remaining counties of the State.⁵² The Northern District is divided into two divisions, known as the Northern and Southern Divisions of the Northern District of Illinois. The Southern Division includes the counties of Peoria, Stark, Henry, Rock Island, Mercer, Henderson, Warren, Knox, McDonough, Fulton, Putnam, Marshall, Woodford,

⁴² 21 St. at L. ch. 17, p. 62, U. S. R. S. 1st Supp. p. 507, superseding, in this respect, U. S. R. S. § 535; 26 St. at L. 1110.

⁴³ U. S. R. S. § 572; 25 St. at L. ch. 205, p. 690.

⁴⁴ 25 St. at L. ch. 168, p. 671.

⁴⁵ U. S. R. S. § 658; Act of June 20, 1884, ch. 106 (23 St. at L. 50), amending §§ 572, 658 of the Rev. Sts.

⁴⁶ 26 St. at L. 1110.

⁴⁷ U. S. R. S. § 572.

⁴⁸ U. S. R. S. § 658.

⁴⁹ 21 St. at L. ch. 17, p. 82, U. S. R. S. 1st Supp. 507.

⁵⁰ 25 St. at L. ch. 168, p. 671.

⁵¹ 26 St. at L. ch. 656, § 16, p. 217.

⁵² U. S. R. S. § 536, as amended by act of March 2, 1887, ch. 315 (24 St. at L. 442).

Tazewell, Livingston, and Iroquois. The Northern Division includes the remaining counties of the Northern District.⁵³

Terms of both the Circuit and District Courts for the Northern Division of the Northern District of Illinois are held at Chicago on the first Monday in July and the third Monday in December;⁵⁴ and for the Southern Division of the Northern District at Peoria on the third Mondays of April and October.⁵⁵ Terms of both courts in the Southern District of Illinois are held at Springfield on the first Mondays in January and June,⁵⁶ and at Danville on the first Monday of May.⁵⁷ Terms of the District Court alone are held at Cairo on the first Mondays of March and October.⁵⁸

Indiana constitutes one judicial district.⁵⁹ Terms of both Circuit and District Courts are held at Indianapolis on the first Tuesdays in May and November, at New Albany on the first Mondays in January and July,⁶⁰ at Evansville on the first Mondays of April and October,⁶¹ at Fort Wayne on the second Tuesdays in June and December in each year;⁶² and also twice a year at Fort Wayne at such time as the judges of said courts may designate.⁶³

In *Iowa*, two districts,—the Northern and Southern. The counties of Clinton, Jones, Linn, Benton, Black Hawk, Grundy, Harding, Hamilton, Webster, Calhoun, Sac, Ida, Monona, and all the counties north of them, and the counties of Cedar, Johnston, Iowa, and Tama constitute the Northern District of Iowa. The remaining counties of the State constitute the Southern District.⁶⁴ For the purposes of holding terms of court, the *Northern District* of Iowa is divided into four divisions, known as the “Eastern,” “Central,” “Western,” and “Cedar Rapids” Divisions of the Northern District of Iowa. The *Eastern Division* includes the counties of Jackson, Black Hawk, Buchanan, Delaware, Dubuque, Clayton, Fayette, Bremer, Floyd, Chickasaw,

⁵³ Act of March 2, 1887, *supra*.

⁵⁴ U. S. R. S. §§ 572, 658.

⁵⁵ Act of March 2, 1887, ch. 315, § 3, *supra*.

⁵⁶ U. S. R. S. §§ 572, 658.

⁵⁷ 29 St. at L. 212.

⁵⁸ U. S. R. S. § 572.

⁵⁹ U. S. R. S. § 531.

⁶⁰ U. S. R. S. §§ 572, 658.

⁶¹ Act of June 26, 1874, ch. 463 (18 St. at L. 251; U. S. R. S. 1st Supp. 103).

⁶² Act of March 3, 1881 (21 St. at L. 571; U. S. R. S. 1st Supp. 615).

⁶³ Act of June 18, 1878, ch. 269 (20 St. at L. 166; U. S. R. S. 1st Supp. 367).

⁶⁴ Act of July 20, 1882, ch. 312 (22 St. at L. 172), superseding, in this respect, U. S. R. S. § 531; Act of June 4, 1880, ch. 120 (21 St. at L. 155; U. S. R. S. 1st Supp. 536); Act of Feb. 24, 1891, ch. 282, (29 St. at L. 767).

Mitchell, Howard, Winneshiek, and Allamakee.⁶⁵ In this division, both Circuit and District Courts are held at Dubuque on the first Tuesday in April and the fourth Tuesday in November of each year.⁶⁶ *The Central Division* includes the counties of Hamilton, Webster, Calhoun, Pocahontas, Palo Alto, Emmett, Kossuth, Humboldt, Wright, Hancock, Winnebago, Worth, Cerro Gordo, Franklin, and Butler.⁶⁵ Terms of both Circuit and District Courts in this division are held at Fort Dodge⁶⁷ on the second Tuesday of November and first Tuesday of June.⁶⁶ *The Western Division* includes the counties of Monona, Woodbury, Plymouth, Sioux, Lyon, Osceola, O'Brien, Cherokee, Ida, Sac, Buena Vista, Clay, and Dickinson.⁶⁴ Terms of both Circuit and District Courts in this division are held at Sioux City on the first Tuesdays of May and October, at Fort Dodge on the second Tuesday of November and the first Tuesday of June, and at Dubuque on the fourth Tuesday of November and first Tuesday of April.⁶⁶ *The Cedar Rapids Division* includes the counties of Johnston, Iowa, Tama, Grundy, Hardin, Benton, Linn, Jones, and Clinton. Terms of both Circuit and District Courts for this division are held at Cedar Rapids on the third Tuesday of February and the second Tuesday of September.⁶⁸

For the purposes of holding terms of court the *Southern District* of Iowa is divided into three divisions, known as the Eastern, Central, and Western Divisions.

The Eastern Division includes the counties of Scott, Cedar, Muscatine, Washington, Louisa, Keokuk, Appanoose, Davis, Wapello, Jefferson, Van Buren, Henry, Des Moines, and Lee.⁶⁹ Terms of both Circuit and District Courts in this division are held, at Keokuk, on the third Tuesdays of January and June.⁷⁰ *The Central Division* includes the counties of Johnson, Iowa, Poweshiek, Mahaska, Jasper, Tama, Marshall, Story, Boone, Greene, Guthrie, Adair, Dallas, Polk, Madison, Warren, Marion, Clark, Lucas, Decatur, Monroe, and Wayne.⁶⁹ Terms of both Circuit and District Courts in this division are held at Des Moines,⁶⁹ on the second Tuesday of May and the third Tuesday in October.⁷¹ *The Western Division* includes the counties of

⁶⁵ Act of July 20, 1882, ch. 312, § 5.

⁶⁶ 25 St. at L. 87.

⁶⁷ Act of July 20, 1882, ch. 312 (22 St. at L. 172).

⁶⁸ 26 St. at L. 767.

⁶⁹ See references in note 64.

⁷⁰ U. S. R. S. § 572; 18 St. at L. 15 (U. S. R. S. 1st Supp. 4); 21 St. at L. 155 (U. S. R. S. 1st Supp. 536).

⁷¹ U. S. R. S. § 572, made applicable to

Carroll, Crawford, Harrison, Shelby, Audubon, Cass, Pottawattamie, Mills, Montgomery, Adams, Union, Ringgold, Taylor, Page, and Fremont.⁶⁹ Terms of both Circuit and District courts in this division are held, at Council Bluffs,⁶⁹ on the fourth Mondays of March and September.⁷⁰

Kansas constitutes one judicial district.⁷² The terms of the District Court for Kansas are held as follows: at Topeka, on the second Monday in April; at Salina, on the second Monday of May; at Wichita, on the first Monday of March and the second Monday of September; at Leavenworth, on the second Monday of October; at Fort Scott, on the second Monday of January; at Wichita on the first Monday of March.⁷³ At Salina no case can be tried except by consent or special order.⁷⁴ The terms of the Circuit Court for the district of Kansas are held as follows: at Wichita, on the first Monday of March and the second Monday of September; at Topeka, on the fourth Monday of November; at Leavenworth, on the first Monday in June; at Wichita, on the second Monday of September; at Fort Scott, on the second Monday of January; at Wichita, on the second Monday of March.⁷⁵

Kentucky constitutes one district.⁷⁶ This is divided into two divisions. The Owensborough Division consists of the counties of Daviess, Henderson, Union, Christian, Todd, Hopkins, Webster, McLean, Muhlenberg, Logan, Butler, Grayson, Ohio, Hancock, and Breckenridge.⁷⁷ The rest of the State constitutes the other division.⁷⁷ The regular terms of the Circuit and District Courts in this district are held: at Covington, on the second Monday in May and the first Monday in December; at Louisville, on the third Monday in February and the first Monday in October; at Frankfort, on the first Monday in January and second Monday in June; at Paducah, on the first Monday in April and third Monday in November, in each year;⁷⁸ and for the Owensborough

Circuit Courts of this district by act of June 4, 1880, ch. 120, *supra*.

⁷² U. S. R. S. § 531. For special jurisdiction of the courts held in this district, over controversies affecting the Gulf, Colorado and Santa Fé Railroad Company, and the Southern Kansas Railway Company, see 23 St. at L. ch. 177, § 8, p. 72; 23 St. at L. ch. 179, § 8, p. 75; *Briscoe v. Southern Kan. Ry. Co.*, 40 Fed. R. 273.

⁷³ U. S. R. S. § 572; 25 St. at L. ch. 817, § 1, p. 392; 20 St. at L. ch. 177, p. 355,

(U. S. R. S. 1st Supp. 452); Act of June 9, 1890 (26 St. at L. ch. 403, p. 129).

⁷⁴ 25 St. at L. ch. 817, § 1, p. 392.

⁷⁵ U. S. R. S. § 658; Act of March 3, 1879, ch. 177, § 1 (20 St. at L. 355); Act of June 9, 1890 (26 St. at L. ch. 403, p. 129).

⁷⁶ U. S. R. S. § 531.

⁷⁷ 25 St. at L. ch. 792, p. 389.

⁷⁸ U. S. R. S. §§ 572, 658; Act of July 1, 1879, ch. 59, § 1 (21 St. at L. 45; U. S. R. S. 1st Supp. 499).

Division at the city of Owensborough, on the fourth Monday of January and the first Monday of June, for not more than eighteen judicial days in each such term.⁷⁹

In *Louisiana*, two judicial districts, the Eastern and the Western.⁸⁰

The Western District includes the parishes of Caddo, Bossier, Webster, Claiborne, Union, Morehouse, West Carroll, East Carroll, Madison, Richland, Ouachita, Lincoln, Bienville, Red River, De Soto, Sabine, Winn, Natchitoches, Jackson, Caldwell, Franklin, Tensas, Concordia, Catahoula, Grant, Vernon, Rapides, Avoyelles, Saint Landry, La Fayette, Saint Martin, Vermillion, Cameron, and Calcasieu. The remaining parishes form the Eastern District.⁸¹ The Western District is divided into three divisions.⁸¹ All process from the Circuit and District Courts of the Western District of Louisiana against defendants residing in the parishes of Saint Landry, Saint Martin, Cameron, Calcasieu, La Fayette, and Vermillion, are returnable to Opelousas.⁸² All process from said courts against defendants residing in the parishes of Rapides, Vernon, Avoyelles, Catahoula, Grant, and Winn, are returnable to Alexandria.⁸³ All process from said courts against defendants residing in the parishes of Caddo, De Soto, Bossier, Webster, Claiborne, Bienville, Natchitoches, Red River, and Sabine, are returnable at Shreveport.⁸⁴ All process from said courts against defendants residing in the parishes of Ouachita, Franklin, Richland, Morehouse, East Carroll, West Carroll, Madison, Tensas, Concordia, Union, Caldwell, Jackson, and Lincoln are returnable at Monroe.⁸⁴ The Eastern District is divided into two divisions.⁸⁵ All process from the Circuit and District Courts for the Eastern District of Louisiana against defendants residing in the parishes of Pointe Coupee, West Baton Rouge, Iberville, Ascension, East Feliciana, West Feliciana, East Baton Rouge, Saint Helena, and Livingston are returnable to such courts at Baton Rouge.⁸⁶ All process against defendants residing in the other parishes of the Eastern District are returnable at New Orleans.⁸⁷ In the Western District, the terms of the Circuit and District Courts are held: at Opelousas, on the first Mondays of January and June; at Alexandria, on the fourth Mondays of

⁷⁹ 25 St. at L. ch. 792, p. 388.

⁸⁰ 21 St. at L. 507 (U. S. R. S. 1st Supp. 611).

⁸¹ 25 St. at L. ch. 789, § 1, p. 388.

⁸² 25 St. at L. ch. 789, § 1, p. 388.

⁸³ 25 St. at L. ch. 789, § 1, p. 388.

⁸⁴ 25 St. at L. ch. 789, § 1, p. 388.

⁸⁵ 25 St. at L. ch. 869, p. 438.

⁸⁶ 25 St. at L. ch. 869, p. 438.

⁸⁷ 25 St. at L. ch. 869, p. 438.

January and June; at Shreveport, on the third Mondays of February and July; and at Monroe, on the first Mondays of April and October in each year.⁸⁸ Terms of the District Courts for the Eastern District are held at New Orleans, on the third Mondays in February, May, and November.⁸⁹ Terms of the Circuit Courts for the same district are held at New Orleans, on the fourth Monday in April and the first Monday in November.⁹⁰ Terms of both courts are held at Baton Rouge on the second Mondays of April and November.⁹¹

Maine constitutes one judicial district.⁹² The terms of the District Court are held at Portland, on the first Tuesdays of February and December;⁹³ at Bangor, on the first Tuesday of June;⁹⁴ at Bath, on the first Tuesday of September.⁹⁵ The terms of the Circuit Court are held at Portland, on the twenty-third days of April and September.⁹⁶

Maryland forms one judicial district,⁹⁷ the District Courts of which are held at Baltimore on the first Tuesdays in March, June, September, and December.⁹⁸ The terms of the Circuit Courts for the same district are held at Baltimore on the first Mondays in April and November.⁹⁹

Massachusetts forms one judicial district.¹⁰⁰ The terms of the District Courts are held at Boston on the third Tuesday in March, on the fourth Tuesday in June, on the second Tuesday in September, and on the first Tuesday in December.¹⁰¹ The terms of the United States Circuit Courts for this district are held at Boston, on the fifteenth days of May and October.¹⁰²

In *Michigan*, two districts, the Eastern and Western; and the latter has a Northern and a Southern Division. The Northern Division of the Western District includes all the territory and waters of the upper peninsula of the State.¹⁰³ The Southern Division of this district comprises all that portion of the southern

⁸⁸ Act of March 3, 1881, ch. 144, § 5 (21 St. at L. 507; U. S. R. S. 1st Supp. 611).

⁸⁹ U. S. R. S. § 572; Act of March 3, 1881, ch. 144, § 6, *supra*.

⁹⁰ U. S. R. S. § 658; Act of March 3, 1881, *supra*.

⁹¹ 25 St. at L. ch. 869, p. 438.

⁹² U. S. R. S. § 531.

⁹³ U. S. R. S. § 572.

⁹⁴ Act of Jan. 18, 1884, ch. 1 (23 St. at L. 1).

⁹⁵ U. S. R. S. § 572.

⁹⁶ U. S. R. S. § 658.

⁹⁷ U. S. R. S. § 531.

⁹⁸ U. S. R. S. § 572.

⁹⁹ U. S. R. S. § 658.

¹⁰⁰ U. S. R. S. § 531.

¹⁰¹ U. S. R. S. § 572.

¹⁰² U. S. R. S. § 658.

¹⁰³ Act of June 19, 1878, ch. 326 (20 St. at L. 175; U. S. R. S. 1st Supp. 375).

or lower peninsula lying west of a line described as follows by the Revised Statutes:—

“Commencing at the southwest corner of Branch county, in said State, and running thence north on the west line of Branch and Calhoun counties, to the south line of Barry county: thence east on the north line of Calhoun and Jackson counties, to the southeast corner of Eaton county; thence north on the east boundary of Eaton county to the south line of Clinton county; thence west on the south boundary of said county to the southwest corner thereof; thence north on the west boundary of Clinton and Gratiot counties, to the south boundary of Isabella county; thence west on its south boundary, to the southwest corner of said last named county; thence north on the west line of Isabella and Clare counties, to the south boundary of Missaukee county; thence east, on its south boundary, to the southeast corner of Missaukee county; thence north, on the east line of Missaukee, Kalamazoo, and Antrim counties, to the south boundary of Emmett county; thence east, to the southeast corner of Emmett county; thence north on the east boundary of Emmett county, to the straits of Mackinac; thence north to midway across said straits; thence westerly in a direct line to a point on the shore of Lake Michigan where the north boundary of Delta county reaches Lake Michigan.”¹⁰⁴ The eastern division includes the remaining portion of the territory and waters of the southern peninsula.¹⁰⁴ Terms of both Circuit and District Courts in the Southern Division of the Western District are held at Grand Rapids on the first Tuesdays of March and October; and in the Northern Division, at Marquette, on the first Tuesdays of May and September.¹⁰⁵ In the Eastern District, terms of both courts are held at Bay City at such times as the courts shall appoint;¹⁰⁶ and at Detroit, on the first Tuesdays of March, June, and November.¹⁰⁷

Minnesota constitutes one judicial district, which is divided into six divisions, known as the First, Second, Third, Fourth, Fifth, and Sixth Divisions.¹⁰⁸ That portion of the State of Minnesota comprising the counties of Winona, Wabasha, Olmsted,

¹⁰⁴ U. S. R. S. § 538; and see Act of June 19, 1878, *supra*.

¹⁰⁵ Act of June 19, 1878, ch. 326, *supra*, § 2.

¹⁰⁶ Act of Feb. 28, 1887, ch. 269 (24 St. at L. 423).

¹⁰⁷ U. S. R. S. §§ 572, 658.

¹⁰⁸ U. S. R. S. § 531; 26 St. at L. ch. 167, § 1, p. 72.

Dodge, Steele, Mower, Fillmore, and Houston constitute the First Division, the courts of which are held at Winona; the counties of Freeborn, Faribault, Martin, Jackson, Nobles, Rock, Pipestone, Murray, Cottonwood, Watonwan, Blue Earth, Waseca, Le Sueur, Nicollet, Brown, Redwood, Lyon, Lincoln, Yellow Medicine, Sibley, and Lac Qui Parle, constitute the Second Division, the courts of which are held at Mankato; the counties of Chicago, Washington, Ramsey, Dakota, Goodhue, Rice, and Scott constitute the Third Division, the courts of which are held at St. Paul; the counties of Hennepin, Wright, Meeker, Kandiyohi, Swift, Chippewa, Renville, McLeod, Carver, Anoka, Sherburne, and Isanti constitute the Fourth Division, the courts of which are held at Minneapolis; the counties of Cook, Lake, St. Louis, Itasca, Cass, Crow Wing, Aitkin, Carlton, Pine, Kanabec, Mille Lacs, Morrison, and Benton constitute the Fifth Division, the courts of which are held at Duluth; the counties of Stearns, Pope, Stevens, Big Stone, Traverse, Grant, Douglas, Todd, Otter Tail, Wilkin, Clay, Becker, Wadena, Norman, Polk, Marshall, Kittson, Beltrami, and Hubbard constitute the Sixth Division, the courts of which are held at Fergus Falls.¹⁰⁹

The terms of the Circuit and District Courts are held, for the First Division, on the first Tuesdays of June and December; for the Second Division, on the third Tuesday of April and the first Tuesday of November; for the Third Division, on the fourth Tuesday of June and the second Tuesday of January; for the Fourth Division, on the first Tuesday in March and the first Tuesday in September; for the Fifth Division, on the second Tuesdays of May and October; and for the Sixth Division, on the fourth Tuesdays of March and September.¹¹⁰

In *Mississippi*, two districts, the Northern and Southern. The Northern District is subdivided into Eastern and Western Divisions. The Eastern Division of the Northern District includes the counties of Tishamingo, Alcorn, Prentiss, Itawamba, Lee, Pontotoc, Monroe, Chickasaw, Clay, Oktibbeha, Lowndes, Noxubee, Winston, Choctaw, Attala, Neshoba, and Kemper, as they existed June 15, 1882. The Western Division of the Northern District comprises the counties of Carroll, Bolivar, Coahoma, Tunica, De Soto, Tate, Marshall, Panola, Benton, Tippah, Sunflower, Montgomery, Grenada, Tallahatchee, La Fayette, Union,

¹⁰⁹ 26 St. at L. ch. 167, § 1, p. 72.

¹¹⁰ 26 St. at L. ch. 167, § 4, p. 73.

Webster, Calhoun, Quitman, and Yalabusha, as they existed in June, 1882.¹¹¹

Terms of both Circuit and District Courts in the Eastern Division of the Northern District are held at Aberdeen, on the first Mondays of April and October, to continue twenty-four judicial days if the business so long require. The terms of both courts for the Western Division are held at Oxford, on the first Mondays of June and December, to continue as long as the business may require.¹¹²

In the Northern District the judge is authorized to appoint and hold additional special terms.¹¹³

The Southern District of Mississippi is divided into three divisions. The Western Division consists of the counties of Washington, Sharkey, Inaquina, and Motte.¹¹⁴ The Southern Division consists of the counties of Hancock, Harrison, Jackson, Marion, Perry, and Green.¹¹⁵ The remainder of the Southern District constitutes the other division.¹¹⁶ The terms of the Circuit and District Courts for the Western Division are held at Vicksburg, on the first Mondays of January and July in each year; for the Southern Division, at Mississippi City, on the third Mondays of February and August; for the other division of the Southern District the terms of the Circuit Court are held at Jackson, on the first Mondays of May and November,¹¹⁷ and the terms of the District Court for the same are held at Jackson, on the fourth Mondays of January and June in each year.¹¹⁷

In *Missouri*, two districts, the Eastern and Western. The Eastern District of Missouri embraces the following counties: St. Louis, Franklin, Gasconade, Jefferson, Crawford, Washington, St. François, St. Genevieve, Dent, Iron, Madison, Perry, Bollinger, Cape Girardeau, Shannon, Reynolds, Wayne, Scott, Carter, Oregon, Ripley, Butler, Stoddard, New Madrid, Mississippi, Dunklin, Pemiscot, Montgomery, Lincoln, Warren, St. Charles, Macon, Adair, Clarke, Knox, Lewis, Marion, Monroe, Pike, Ralls, Schuyler, Scotland, Shelly, and Ran-

¹¹¹ Act of June 15, 1882, ch. 218 (22 St. at L. 101); Act of July 8, 1886, ch. 745 (24 St. at L. 127).

¹¹² Act of June 15, 1882, ch. 218 (22 St. at L. 101); Act of July 8, 1886 (24 St. at L. 127).

¹¹³ Act of June 15, 1882, ch. 218 (22 St. at L. 103).

¹¹⁴ 24 St. at L. ch. 279, p. 430.

¹¹⁵ 25 St. at L. ch. 58, p. 78.

¹¹⁶ 24 St. at L. 430.

¹¹⁷ 24 St. at L. ch. 279, p. 430; U. S. R. S. §§ 572, 658; 25 St. at L. ch. 58, p. 78.

dolph. The remaining counties of the State form the Western District.¹¹⁸

There are two divisions in the Eastern District. The city of St. Louis and the counties of St. Louis, Franklin, Gasconade, Jefferson, Crawford, Washington, St. François, St. Genevieve, Dent, Iron, Madison, Perry, Bollinger, Cape Girardeau, Shannon, Reynolds, Wayne, Scott, Carter, Oregon, Ripley, Butler, Stoddard, New Madrid, Mississippi, Dunklin, Pemiscot, Montgomery, Lincoln, Warren, and St. Charles form the Eastern Division. The remaining counties of the Eastern District constitute the Northern Division.¹¹⁹

The Western District of Missouri is divided into four divisions. The counties of Clay, Ray, Carroll, Chariton, Sullivan, Jackson, La Fayette, Saline, Cass, Johnson, Bates, Henry, Vernon, Putnam, Caldwell, Livingston, Grundy, Mercer, Linn, Barton, Jasper, and St. Clair form the Western Division of the Western District. The counties of Atchison, Nodaway, Holt, Andrew, Buchanan, Platte, Clinton, Harrison, Daviess, De Kalb, Gentry, and Worth form the St. Joseph Division. The counties of Cedar, Polk, Dallas, Laclede, Pulaski, Dade, Greene, Webster, Wright, Texas, Lawrence, Christian, Douglas, Howell, Newton, Barry, McDonald, Stone, Taney, and Ozark form the Southern Division of the Western District. The remaining counties of the Western District form the Central Division.¹²⁰ In each of the divisions of the Eastern and Western Districts there are established a District and a Circuit Court of the United States.¹²¹ There are held two terms of the District and Circuit Courts in each year in each of the divisions.¹²¹ The times and places of holding the District Court in the Eastern District are, for the Eastern Division, at St. Louis, on the first Mondays in May and November; and for the Circuit Court, at the same place, on the third Mondays in March and September.¹²² For the Northern Division, for both courts, at Hannibal, on the first Mondays in May and November.¹²³ Courts for the Western District are held as follows :

¹¹⁸ U. S. R. S. § 540; 24 St. at L. 424; (26 St. at L. 106); Act of Aug. 20, 1890, ch. 818 (26 St. at L. 369).

¹¹⁹ Act of Feb. 28, 1887, ch. 271 (24 St. at L. 424).

¹²⁰ 24 St. at L. 424; 25 St. at L. 498.

¹²¹ Act of Feb. 28, 1887, ch. 271 (24 St. at L. 424); Act of May 14, 1890, ch. 202

¹²² U. S. R. S. §§ 572, 658; Act of Feb. 28, 1887, ch. 271 (24 St. at L. 424).

¹²³ Act of Feb. 28, 1887, ch. 271 (24 St. at L. 424); 25 St. at L. ch. 129, § 1, p. 88; Act of May 14, 1890, ch. 202 (26 St. at L. 106).

both courts for the Central Division, at Jefferson City, on the third Mondays in April and November;¹²⁴ both courts for the St. Joseph Division, at St. Joseph, on the first Mondays in April and November;¹²⁵ both courts for the Western Division, at Kansas City, on the first Mondays in March and September;¹²⁶ both courts for the Southern Division, at Springfield, on the third Mondays in May and October.¹²⁷

Montana, on its admission as a State, constitutes one district.¹²⁸

Nebraska forms one judicial district.¹²⁹ The time and places of holding courts therein, Circuit and District, are at Omaha, on the second Mondays of May and November; at Lincoln, on the second Monday of January; in Hastings, on the second Monday in March; and at Norfolk, on the second Monday of April.¹³⁰

Nevada forms one judicial district.¹³¹ The District Courts therein are held at Carson City, on the first Mondays in February, May, and October.¹³² And the Circuit Courts for the same are held at Carson City, on the third Monday of March and the first Monday of November of each year.¹³³

New Hampshire forms one judicial district,¹³⁴ the District Courts in which are held at Portsmouth on the third Tuesday in March and September, and at Concord, on the third Tuesday in June and December.¹³⁵ The terms of the Circuit Court for the same are held at Portsmouth on the eighth day of May, and at Concord on the eighth day of October.¹³⁶

New Jersey constitutes one judicial district, in which the terms of the District Court are held at Trenton on the third Tuesdays in January, April, June, and September. The terms of the Circuit Court for the same district are held at Trenton on the fourth Tuesdays in March and September in each year.¹³⁷

¹²⁴ Act of Feb. 28, 1887, ch. 271 (24 St. at L. 424); U. S. R. S. §§ 572, 658.

¹²⁵ Act of Feb. 28, 1887, ch. 271 (24 St. at L. 424); Act of Aug. 29, 1890, ch. 818 (26 St. at L. 369).

¹²⁶ Act of Feb. 28, 1887, ch. 271 (24 St. at L. 424); Act of Jan. 21, 1879, ch. 20 (20 St. at L. 263; U. S. R. S. 1st Supp. 392); Act of Aug. 29, 1890, ch. 818 (26 St. at L. 369).

¹²⁷ Act of Feb. 28, 1887, ch. 271 (24 St. at L. 424); Act of May 14, 1890, ch. 206 (26 St. at L. 406); Act of Aug. 29, 1890, ch. 818 (26 St. at L. 369).

¹²⁸ 25 St at L. ch. 180, p. 682.

¹²⁹ U. S. R. S. § 531.

¹³⁰ 25 St. at L. ch. 891, § 1, p. 443.

¹³¹ U. S. R. S. § 531.

¹³² U. S. R. S. § 572.

¹³³ Act of Feb. 18, 1876, ch. 11 (19 St. at L. 4; U. S. R. S. 1st Supp. 200).

¹³⁴ U. S. R. S. § 531.

¹³⁵ U. S. R. S. § 572; Act of Feb. 23, 1881, ch. 71 (21 St. at L. 330).

¹³⁶ U. S. R. S. § 658; Act of Feb. 23, 1881, ch. 71 (21 St. at L. 330).

¹³⁷ U. S. R. S. §§ 531, 572, 658.

In *New York*, three districts, the Northern, the Eastern, and the Southern. The Northern District includes the counties of Rensselaer, Albany, Schoharie, and Delaware, with all the counties north and west of them. The Eastern District includes the counties of Richmond, Kings, Queens, and Suffolk, with the waters thereof. The remainder of the State with the waters thereof constitutes the Southern District.¹³⁸ The District Courts of the Southern and Eastern Districts of New York have concurrent jurisdiction over the waters within the counties of New York, Kings, Queens, and Suffolk, and over all seizures made and all matters done in such waters.¹³⁹ The terms of the District Court for the Northern District of New York are held at Albany on the third Tuesday in January; at Utica, on the third Tuesday in March; at Rochester, on the second Tuesday in May; at Buffalo, on the third Tuesday in September; at Auburn, on the third Tuesday in November; and, in the discretion of the judge of the court, one term annually at such time and place within the counties of Onondaga, Saint Lawrence, Clinton, Jefferson, Oswego, and Franklin, as he may from time to time appoint.¹⁴⁰ The terms of the Circuit Court for the same district are held at Canandaigua, on the third Tuesday in June; at Syracuse, on the third Tuesday in November; at Albany, on the third Tuesday in January. "And when the said term appointed to be held at Albany be adjourned, it shall be adjourned to meet in Utica on the third Tuesday in March; but said adjourned term shall be for the transaction of civil business only."¹⁴¹

The terms of the District Court for the Southern District of New York are held in the city of New York, on the first Tuesday in every month.¹⁴² The terms of the Circuit Court for the same district are held at the city of New York on the first Monday in April, and the third Monday in October; and for the trial of criminal causes and suits in equity, on the last Monday in February; and, exclusively for the trial and disposal of criminal cases and matters arising and pending in said court, on the second Wednesdays in January, March, and May, on the third Wednesday in June, and on the second Wednesdays in October

¹³⁸ U. S. R. S. § 511; U. S. R. S. 1st Supp. 138.

¹³⁹ U. S. R. S. § 512.

¹⁴⁰ U. S. R. S. § 572; Act of March 23, 1882, ch. 48, p. 32 (22 St. at L. 32).

¹⁴¹ U. S. R. S. § 658; Act of March 23, 1882, ch. 48, p. 32 (22 St. at L. 33).

¹⁴² U. S. R. S. § 572.

and December: "*Provided*, that the holding of any of the last-mentioned terms for criminal business shall not dispense with nor affect the holding of any other term of court at the same time, and that the pending of any other term of court shall not prevent the holding of any of said terms for criminal business."¹⁴³ District and Circuit Courts for the Eastern District of New York are held at Brooklyn on the first Wednesday in every month.¹⁴⁴

In *North Carolina*, two judicial districts, the Eastern and the Western. The Western District includes the counties of Mecklenburg, Cabarras, Stanly, Montgomery, Richmond, Davie, Davidson, Randolph, Guilford, Rockingham, Stokes, Forsyth, Union, Anson, Caswell, Person, Alamance, Orange, Chatham, Moore, Clay, Cherokee, Swain, Macon, Jackson, Graham, Haywood, Transylvania, Henderson, Buncombe, Madison, Yancey, Mitchell, Watauga, Ashe, Alleghany, Caldwell, Burke, McDowell, Rutherford, Polk, Cleveland, Gaston, Lincoln, Catawba, Alexander, Wilkes, Surry, Iredell, Yadkin, and Rowan, and all counties which have been formed within this territory since June 4th, 1872. The Eastern District includes the residue of the State.¹⁴⁵ The terms of District and Circuit Courts for the Western District of North Carolina are held at Greensborough, on the first Mondays in April and October; at Statesville, on the third Mondays in April and October; at Asheville, on the first Mondays in May and November; and at Charlotte, on the second Mondays of June and December.¹⁴⁶ The terms of the District Court for the Eastern District of North Carolina are held at Elizabeth City, on the third Mondays in April and October; at New Berne, on the fourth Mondays in April and October; and at Wilmington on the first Mondays after the fourth Mondays in April and October.¹⁴⁷ The terms of the Circuit Court for the same district are held at Raleigh, on the first Monday in June and last Monday in November; and at Wilmington, on the first Mondays after the fourth Mondays in April and October.¹⁴⁸

North Dakota constitutes one judicial district, which is divided into four divisions, known as the Southwestern, Southeastern, Northeastern, and Northwestern Divisions. The portion of the

¹⁴³ U. S. R. S. § 658.

¹⁴⁴ U. S. R. S. §§ 572, 658.

¹⁴⁵ U. S. R. S. § 543.

¹⁴⁶ U. S. R. S. §§ 572, 658; Act of June

¹⁴⁷ U. S. R. S. § 572.

¹⁴⁸ U. S. R. S. § 658; Act of Feb. 17, 1887, ch. 137 (24 St. at L. 406).

19, 1878, ch. 322 (20 St. at L. 173).

State comprising the counties of Burleigh, Stutsman, Logan, McIntosh, Emmons, Kidder, Foster, Wells, McLean, and all territories in said State of North Dakota lying south and west of the Missouri River constitutes the Southwestern Division, as said counties were bounded on April 26, 1890, the court for which is held at the city of Bismarck. That portion of the State comprising the present counties of Cass, Richland, Barnes, Sargent, Dickey, La Moure, Ransom, Griggs, and Steele constitute the Southeastern Division, as said counties were bounded on April 26, 1890, the court for which is held at the city of Fargo. The portion of the State comprising the present counties of Grand Forks, Traill, Walsh, Pembina, Cavalier, and Nelson, as said counties were bounded on April 26, 1890, constitute the Northeastern Division, the court for which is held in the city of Grand Forks. That portion of the State comprising the present counties of Ramsey, Eddy, Benson, Towner, Rolette, Bottineau, Pierce, McHenry, and Ward, and all the territory in said State of North Dakota lying north of the Southwestern Division constitute the Northwestern Division, as said counties were bounded April 26, 1890, the court for which is held in the city of Devil's Lake.¹⁴⁹ The terms of the District and Circuit Courts are held each year for the Southwestern Division at Bismarck on the first Tuesday of April; for the Southeastern Division at Fargo on the third Tuesday of May; for the Northeastern Division at Grand Forks on the first Tuesday of December; and for the Northwestern Division at Devil's Lake on the first Tuesday of February.¹⁵⁰

In *Ohio*, two districts, — the Northern and the Southern. The Southern District includes the counties of Belmont, Guernsey, Muskingum, Licking, Franklin, Madison, Champaign, Shelby, and Mercer, as they existed February 10, 1855, with all the counties south of them, and also the counties of Union, Delaware, Morrow, Knox, Coshocton, Harrison, and Jefferson. The Northern District includes the residue of the State.¹⁵¹

The Northern District of Ohio is divided into two divisions. The counties of Williams, Defiance, Paulding, Van Wert, Mercer, Auglaize, Allen, Putnam, Henry, Fulton, Lucas, Wood, Hancock,

¹⁴⁹ 26 St. at L. ch. 161, § 2, pp. 67, 68.

¹⁵¹ U. S. R. S. § 544; Act of Feb. 4,

¹⁵⁰ 25 St. at L. ch. 180, p. 682; Act of 1880, ch. 18 (21 St. at L. 63; U. S. R. S. April 26, 1890, 26 St. at L. ch. 161, § 3, 1st Supp. 508).
p. 68 (26 St. at L. 68).

Hardin, Logan, Marion, Wyandot, Seneca, Sandusky, Ottawa, Erie, and Huron form the Western Division. The remaining counties in the said district form the Eastern Division.¹⁵²

The Southern District of Ohio is divided into two divisions. The Eastern Division consists of the counties of Union, Delaware, Morrow, Knox, Coshocton, Harrison, Jefferson, Madison, Fayette, Franklin, Pickaway, Ross, Pike, Gallia, Jackson, Meigs, Vinton, Athens, Hocking, Fairfield, Licking, Perry, Muskingum, Morgan, Washington, Noble, Monroe, Belmont, and Guernsey. The Western Division includes the remaining counties of said district.¹⁵³

The terms of the Circuit and District Courts for the Northern District of Ohio are held in Cleveland, in the Eastern Division, on the first Tuesdays of February, April, and October; and in Toledo, in the Western Division, on the first Tuesdays of June and December of each year.¹⁵⁴ The terms of both courts for the Southern District are held at Cincinnati on the first Tuesdays in February, April, and October, and at Columbus on the first Tuesdays in June and December.¹⁵⁵

Oregon constitutes one judicial district,¹⁵⁶ in which the terms of the District Court are held at Portland on the first Mondays in March, July, and November.¹⁵⁷ The Circuit Court for the same district is held at Portland on the second Monday of April and the first Monday of October.¹⁵⁸

In *Pennsylvania*, two districts.¹⁵⁹ The Western District includes the counties of Fayette, Greene, Washington, Allegheny, Westmoreland, Somerset, Bedford, Huntingdon, Centre, Mifflin, Clearfield, McKean, Potter, Jefferson, Cambria, Indiana, Armstrong, Butler, Beaver, Mercer, Crawford, Venango, Erie, Warren, Susquehanna, Bradford, Tioga, Union, Northumberland, Columbia, Luzerne, and Lycoming, as they existed April 20, 1818. The Eastern District includes the rest of the State.¹⁶⁰ The terms of the District Court for the Eastern District of Pennsylvania are held at Philadelphia on the third Mondays in

¹⁵² Act of June 8, 1878, ch. 169 (20 St. at L. 101); Act of Feb. 4, 1880, ch. 18 (21 St. at L. 63).

¹⁵³ Act of Feb. 4, 1880, ch. 18 (21 St. at L. 509); U. S. R. S. 1st Supp. 508.

¹⁵⁴ U. S. R. S. §§ 572, 658; Act of June 8, 1878, ch. 169 (20 St. at L. 101); Act of July 27, 1882, ch. 351 (22 St. at L. 176).

¹⁵⁵ U. S. R. S. §§ 572, 658; Act of Feb. 4, 1880, ch. 18 (21 St. at L. 63).

¹⁵⁶ U. S. R. S. § 531.

¹⁵⁷ U. S. R. S. § 572.

¹⁵⁸ U. S. R. S. § 658; Act of June 16, 1874, ch. 287 (18 St. at L. 76); Act of Feb. 18, 1876, ch. 11 (19 St. at L. 4).

¹⁵⁹ U. S. R. S. § 545.

¹⁶⁰ U. S. R. S. § 545.

February, May, August, and November. The terms of the Circuit Court for the same district are held at Philadelphia on the first Mondays in April and October.¹⁶¹ The terms of the District Court for the Western District are held at Pittsburgh on the first Monday in May and on the third Monday in October; at Williamsport on the third Monday in June and on the first Monday in October; at Erie on the second Monday in January and the third Monday in July;¹⁶² and at Scranton on the first Mondays of March and September.¹⁶³ The terms of the Circuit Court for the same district are held at Erie on the second Monday of January and third Monday of July; at Pittsburgh on the second Mondays in May and November; at Williamsport on the third Mondays in June and September; and at Scranton on the first Mondays of March and September.¹⁶⁴

Rhode Island constitutes one judicial district, in which the terms of the District Court are held at Providence on the first Tuesdays in February and August; at Newport on the second Tuesdays in May and on the third Tuesday in October. The Circuit Court for the same district is held at Providence on the fifteenth days of June and November.¹⁶⁵

In *South Carolina*, two districts, — the Eastern and Western. The Western District includes the counties of Lancaster, Chester, York, Union, Spartanburgh, Greenville, Pendleton, Abbeville, Edgefield, Newburry, Laurens, and Fairfield, as they existed February 21, 1823. The Eastern District includes the residue of the State.¹⁶⁶ The terms of the Circuit Court for the Eastern District are held at Charleston on the first Monday of April, and at Columbia on the fourth Monday of November. The terms of the District Court for the Eastern District are held at Charleston on the first Mondays in January, April, and July, and at Columbia on the fourth Monday of November.¹⁶⁷ In the Western District the terms of both courts are held at Greenville on the first Mondays of February and August.¹⁶⁸

South Dakota constitutes one judicial district, which is di-

¹⁶¹ U. S. R. S. §§ 572, 658.

¹⁶² U. S. R. S. § 572.

¹⁶³ Act of Aug. 5, 1886, ch. 931 (24 St. at L. 336).

¹⁶⁴ U. S. R. S. § 658; 24 St. at L. 336.

¹⁶⁵ U. S. R. S. §§ 531, 572, 658.

¹⁶⁶ U. S. R. S. § 546; 25 St. at L. ch. 113, p. 655.

¹⁶⁷ U. S. R. S. §§ 572, 658; Act of April 26, 1890, ch. 165 (26 St. at L. 71).

¹⁶⁸ U. S. R. S. § 572; 25 St. at L. 655; Act of April 26, 1890, ch. 165 (26 St. at L. 71).

vided into three divisions, known as the Eastern, Central, and Western Divisions. The counties of Clay, Union, Yankton, Turner, Lincoln, Bonhomme, Charles Mix, Douglas, Hutchinson, Brule, Aurora, Davidson, Hanson, McCook, Minnehaha, Moody, Lake, Lyman, Miner, Sanborn, Beadle, Kingsbury, Brookings, Hamlin, Deuel, Grant, Roberts, Codington, Clark, Day, Marshall, Spink, Brown, Gregory, Todd, and the Yankton, Sisseton, Wahpeton, and Crow Creek Indian Reservations constitute the Eastern Division, the court for which is held at the city of Sioux Falls. The counties of McPherson, Edmunds, Campbell, Walworth, Potter, Sully, Faulk, Hand, Hyde, Hughes, Buffalo, Jerauld, Stanley, Knowlen, and that portion of the counties of Pratt, Jackson, and Sterling not included in any Indian reservation, and the Standing Rock, Cheyenne, and Lower Brule Indian Reservations constitute the Central Division, the court for which is held at the city of Pierre. All that portion of the State of South Dakota lying west of the Central Division, and in addition thereto the Rosebud and Red Cloud Indian Reservations constitute the Western Division, the court for which is held at the city of Deadwood.¹⁶⁹ The terms of the Circuit Court are held for the Eastern Division at Sioux Falls on the first Tuesdays of April and October; for the Central Division at Pierre on the third Tuesday of November; and for the Western Division at Deadwood on the first Tuesday of July.¹⁷⁰ The terms of the District Court are held for the Eastern Division at Sioux Falls on the first Tuesdays of April and October in each year; for the Central Division at Pierre on the third Tuesdays of May and November in each year; and at Deadwood on the first Tuesdays of January and July in each year.¹⁷¹

In *Tennessee*, three districts, — the Eastern, Western, and Middle. The Eastern District includes the counties of Anderson, Bledsoe, Blount, Bradley, Campbell, Carter, Claiborne, Cocke, Cumberland, Fentress, Grainger, Greene, Hamilton, Hancock, Hawkins, Jefferson, Johnson, Knox, McMinn, Marion, Meigs, Monroe, Morgan, Polk, Rhea, Roane, Scott, Sevier, Sullivan, Union, and Washington, as they existed February 19, 1856.¹⁷² The Western District includes the Counties of Benton, Carroll, Henry, Obion, Dyer, Gibson, Lauderdale, Haywood, Tipton, Shelby,

¹⁶⁹ 25 St. at L. ch. 180, p. 682; 26 St. at L. ch. 21, § 2, p. 14.

¹⁷⁰ 26 St. at L. ch. 21, § 5, p. 14.

¹⁷¹ 26 St. at L. ch. 21, § 3, p. 14.

¹⁷² U. S. R. S. § 547; 21 St. at L. 751; 23 St. at L. 280.

Fayette, Hardeman, McNairy, Hardin, Madison, Henderson, and Weakley, as they existed June 18, 1838. The Middle District includes the residue of the State.¹⁷³ The Western District of Tennessee is divided into two divisions, called the Eastern and Western Divisions. The Eastern Division includes the counties of Benton, Carroll, Decatur, Gibson, Hardeman, Henderson, Henry, McNairy, Madison, Hardin, Dyer, Lake, Crockett, Weakley, and Obion, and the terms of the Circuit and District Courts are held therein at Jackson, at least twice in each year, at such times as the judges thereof respectively fix.¹⁷⁴ The remaining counties embraced in this district constitute the Western Division thereof, and the terms of District and Circuit Courts are held at Memphis on the fourth Mondays in May and November.¹⁷⁵

The Eastern District of Tennessee is divided into two divisions, known as the Northern and Southern Divisions of the Eastern District. The Southern Division includes the counties of Hamilton, James, Polk, McMinn, Bradley, Meigs, Rhea, Marion, Sequatchie, Bledsoe, Fentress, and Cumberland. The Northern Division consists of the remaining counties in the district.¹⁷⁶ The District and Circuit Courts for the Eastern District are held at Knoxville, on the second Mondays in January and July; and at Chattanooga on the first Mondays of April and October in each year.¹⁷⁷ The terms of the District and Circuit Courts for the Middle District of Tennessee are held at Nashville, on the third Mondays in April and October.¹⁷⁸

In *Texas*, three districts, the Northern, Eastern, and Western.¹⁷⁹ The Northern District is composed of the counties of Brazos, Robertson, Leon, Limestone, Freestone, Navarro, Ellis, Kaufman, Dallas, Rockwall, Hunt, Collin, Grayson, Cooke, Denton, Tarrant, Johnson, Hill, McLennan, Falls, Bell, Coryell, Hamilton, Bosque, Comanche, Erath, Somerville, Hood, Parker, Palo, Pinto, Jack,

¹⁷³ U. S. R. S. § 547; 18 St. at L. 480; 21 St. at L. 757; 23 St. at L. 280.

¹⁷⁴ Act of June 20, 1878, ch. 359, § 17 (20 St. at L. 206); Act of Jan. 15, 1883, ch. 25 (22 St. at L. 402); Act of Dec. 27, 1884 (23 St. at L. 280).

¹⁷⁵ Act of June 20, 1878, ch. 359, § 17 (20 St. at L. 206); U. S. R. S. §§ 572, 658.

¹⁷⁶ U. S. R. S. § 547; 21 St. at L. 751; 23 St. at L. 280.

¹⁷⁷ U. S. R. S. §§ 572, 658; Act of June 11, 1880, ch. 203, § 2 (21 St. at L. 751).

¹⁷⁸ U. S. R. S. §§ 572, 658.

¹⁷⁹ U. S. R. S. § 548; 20 St. at L. ch. 97, p. 318; 21 St. at L. ch. 18, § 1, p. 10; 20 St. at L. ch. 97, p. 318; 21 St. at L. ch. 213, p. 198; 25 St. at L. ch. 633, §§ 17, 18, p. 786.

Wise, Montague, Clay, Archer, Wichita, Wilbarger, Hardeman, Knox, Baylor, Haskell, Throckmorton, Young, Stevens, Shackelford, Jones, Taylor, Callahan, Eastland, Brown, Coleman, Runnels, Greer, Nolan, Fisher, Stonewall, King, Cottle, Childress, Collingsworth, Wheeler, Hemphill, Lipscomb, Ochiltree, Roberts, Gray, Donley, Hall, Motley, Dickens, Kent, Scurry, Mitchell, Howard, Borden, Dawson, Gaines, Martin, Andrews, Garza, Crosby, Floyd, Briscoe, Armstrong, Carson, Hutchinson, Hansford, Sherman, Moore, Potter, Randall, Swisher, Hale, Lubbock, Lynn, Terry, Hockley, Lamb, Castro, Deaf Smith, Oldham, Hartley, Dellam, Palmer, Bayley, Cochran, and Yoakum. The Eastern District is composed of the counties of Matagorda, Wharton, Brazoria, Fort Bend, Colorado, Austin, Waller, Harris, Galveston, Chambers, Jefferson, Orange, Hardin, Liberty, Newton, Jasper, Tyler, Polk, San Jacinto, Montgomery, Walker, Grimes, Madison, Trinity, Angelina, San Augustine, Sabine, Shelby, Nacogdoches, Cherokee, Houston, Anderson, Henderson, Smith, Rusk, Panola, Harrison, Gregg, Upshur, Wood, Vanzandt, Rains, Hopkins, Camp, Titus, Marion, Cass, Bowie, Franklin, Morris, Red River, Jackson, Lamar, Fannin, and Delta, and so much of the Indian Territory as is thereto annexed by the Act of March 1, 1889.¹⁸⁰ That Act provides, "that the Chickasaw Nation, in the portion of the Choctaw Nation within the following boundaries, to wit; beginning on Red River, at the southeast corner of the Choctaw Nation; thence north with the boundary line between the said Choctaw Nation and the State of Arkansas, to a point where Big Creek, a tributary of the Black Fork of the Kimishi River, crosses the said boundary line; thence westerly with Big Creek and the said Black Fork to the junction of the said Black Fork with Buffalo Creek; thence northwesterly with said Buffalo Creek to a point where the same is crossed by the old military road from Fort Smith, Arkansas, to Boggy Depot, in the Choctaw Nation; thence southwesterly with the said road to where the same crosses Perryville Creek; thence northwesterly up said Creek to where the same is crossed by the Missouri, Kansas, and Texas Railway track; thence northerly up the centre of the main track of the said road to the South Canadian River; thence up

¹⁸⁰ U. S. R. S. § 548; 20 St. at L. ch. 97, p. 213, p. 198; 25 St. at L. ch. 633, §§ 17, 18, p. 318; 21 St. at L. ch. 18, § 1, p. 10; 20 St. at L. ch. 97, p. 786.

the centre of the main channel of the said river to the western boundary line of the Chickasaw Nation, the same being the northwest corner of the said Nation; thence south on the boundary line between the said Nation and the reservation of the Wichita Indians; thence continuing south with the boundary line between the said Chickasaw Nation and the reservation of the Kiowa, Comanche, and Apache Indians to Red River; thence down said river to the place of beginning. And all that portion of the Indian Territory not annexed to the district of Kansas by the Act approved January sixth, eighteen hundred and eighty-three, and not set apart and occupied by the five civilized tribes, shall, from and after the passage of this Act, be annexed to and constitute a part of the eastern judicial district of the State of Texas, for judicial purposes." "The counties of Lamar, Fannin, Red River, and Delta, of the State of Texas, and all that part of the Indian Territory attached to the said eastern judicial district of the State of Texas by the provisions of this Act, shall constitute a division of the eastern judicial district of Texas; and terms of the Circuit and District Courts of the United States for the said eastern district of the State of Texas shall be held twice in each year at the city of Paris, on the third Mondays in April and the second Mondays in October; and the United States courts herein provided to be held at Paris shall have exclusive original jurisdiction of all offences committed against the laws of the United States within the limits of that portion of the Indian Territory attached to the eastern judicial district of the State of Texas by the provisions of this Act, of which jurisdiction is not given by this Act to the court herein established in the Indian Territory; and all civil process, issued against persons resident in the said counties of Lamar, Fannin, Red River, and Delta cognizable before the United States courts, shall be made returnable to the courts, respectively, to be held at the city of Paris, Texas. And all prosecutions for offences committed in either of said last mentioned counties shall be tried in the division of said eastern district of which said counties form a part: *Provided*, that no process issued or prosecution commenced or suit instituted before the passage of this Act, shall be in any way affected by the provisions thereof." ¹⁸¹

¹⁸¹ 25 St. at L. ch. 333, §§ 17 and 18, pp. 786-787. See *In re Jackson*, 40 Fed. R. 372.

The Western District includes the counties of Calhoun, Aransas, Victoria, Goliad, Refugio, Bee, San Patricio, Neufces, Cameron, Hidalgo, Starr, Zapata, Duval, Encinal, Webb, La Salle, McMullen, Live Oak, De Witt, Lavaca, Gonzales, Wilson, Karnes, Atascosa, Frio Dimmit, Zavala, Maverick, Kinney, Uvalde, Medina, Bexar, Guadalupe, Caldwell, Fayette, Washington, Lee, Burleson, Milan, Williamson, Bastrop, Travis, Hays, Comal, Kendall, Blanco, Burnett, Llano, Gillespie, Kerr, Bandera, Edwards, Kimball, Mason, Menard, El Paso, Presidio, Tom Green, Crockett, Pecos, Concho, McCulloch, San Saba, and Lampasas.¹⁸² The terms of District and Circuit Court for the Northern District are held at Dallas, on the second Monday of January and the third Monday of May; at Graham, on the second Monday of March and the third Monday of October; at Waco, on the second Monday of April and the third Monday of November.¹⁸³ The terms of the same courts for the Eastern District are held at Galveston, on the first Mondays of March and November; at Tyler, on the second Mondays of January and May; at Jefferson, on the second Mondays of February and September; and at Paris, on the third Monday of April and second Monday of October.¹⁸⁴ The terms of the same courts for the Western District are held at Brownsville, on the first Monday of January and the second Monday of June; at San Antonio, on the first Mondays of May and November; at El Paso, on the first Mondays in April and October; and at Austin, on the first Mondays in February and July.¹⁸⁵

Vermont constitutes one judicial district,¹⁸⁶ for which the terms of the District and Circuit Courts are held at Burlington, on the fourth Tuesday in February; at Windsor, on the third Tuesday in May; and at Rutland, on the first Tuesday in October.¹⁸⁷

¹⁸² U. S. R. S. § 548; 20 St. at L. ch. 97, p. 318; 21 St. at L. ch. 18, § 1, p. 10; 20 St. at L. ch. 97, p. 318; 21 St. at L. ch. 213, p. 198; 25 St. at L. ch. 633, §§ 17, 18, p. 786. For special jurisdiction of the courts held in this district over controversies affecting the Gulf, Colorado, and Santa Fé Railroad Company, see 23 St. at L. ch. 177, § 8, p. 72; 23 St. at L. ch. 179, § 8, p. 975; *Briscoe v. Southern Kan. Ry. Co.*, 40 Fed. R. 273.

¹⁸³ Act of June 20, 1884, ch. 102 (23 St. at L. 48).

¹⁸⁴ *Ibid.*, and 25 St. at L. ch. 633, § 18, p. 786.

¹⁸⁵ U. S. R. S. §§ 572, 658; Act of Feb. 24, 1879, ch. 97 (20 St. at L. 318); Act of June 11, 1879, ch. 15 (21 St. at L. 10); Act of Feb. 18, 1881, ch. 62 (21 St. at L. 326); Act of June 3, 1884, ch. 64 (23 St. at L. 35); Act of Feb. 4, 1890, ch. 5 (26 St. at L. 3).

¹⁸⁶ U. S. R. S. § 531.

¹⁸⁷ U. S. R. S. §§ 572, 658; Act of June 5, 1874, ch. 214 (18 St. at L. 53).

In *Virginia* two districts, the Eastern and Western. The Western District includes the counties of Albemarle, Alleghany, Amherst, Appomattox, Augusta, Bath, Bedford, Bland, Botetourt, Buchanan, Buckingham, Campbell, Carroll, Charlotte, Clarke, Craig, Cumberland, Floyd, Franklin, Frederick, Fluvanna, Giles, Grayson, Greene, Halifax, Henry, Highland, Lee, Madison, Montgomery, Nelson, Patrick, Page, Pulaski, Pittsylvania, Rappahannock, Roanoke, Rockbridge, Rockingham, Russell, Scott, Smyth, Shenandoah, Tazewell, Washington, Wise, Wythe, and Warren. The Eastern District includes the residue of the State.¹⁸⁸ The terms of the District and the Circuit Court for the Eastern District are held at Richmond, on the first Mondays in April and October; at Alexandria, on the first Mondays in January and July; and at Norfolk, on the first Mondays in May and November. The terms of the same courts for the Western District are held at Danville, on the Tuesdays after the second Mondays in April and November; at Lynchburg, on the Tuesdays after the second Mondays in March and September; at Abingdon, on the Tuesdays after the first Mondays in May and October; and at Harrisonburgh, on the Tuesdays after the first Mondays in June and December.¹⁸⁹

Washington constitutes one judicial district, which is divided into four divisions, the Eastern, Southern, Northern, and Western. The counties of Spokane, Stevens, Okanogan, Douglas, Lincoln, Adams, and Kittitass, including any and all Indian reservations in one or more of said counties, constitute the Eastern Division, the court for which is held at the city of Spokane Falls. The counties of Whitman, Asotin, Garfield, Columbia, Walla Walla, Franklin, Yakima, and Klickitat, including any and all Indian reservations, constitute the Southern Division, the court for which is held at the city of Walla Walla. The counties of Whatcom, Skagit, San Juan, Island, Snohomish, Clallam, Jefferson, Kitsap, and King, including any and all Indian reservations in one or more of said counties, constitute the Northern Division, the court for which is held at the city of Seattle. The counties of Pierce, Mason, Thurston, Chehalis, Pacific, Lewis, Wahkiakum, Cowlitz, Clarke, and Skamania, including any and all Indian reservations in one or more of said

¹⁸⁸ U. S. R. S. § 549.

14, 1881, ch. 45 (21 St. at L. 324); Act of

¹⁸⁹ U. S. R. S. §§ 572, 658; Act of Feb. Sept. 25, 1890, ch. 922 (26 St. at L. 474).

counties, constitute the Western Division, the court for which is held at the city of Tacoma.¹⁹⁰

The terms of the Circuit and District Courts of the United States are held, for the Eastern Division, at Spokane Falls, on the first Tuesdays of September and April; for the Southern Division, at Walla Walla, on the first Tuesdays of November and May; for the Northern Division, at Seattle, on the first Tuesdays of December and June; and for the Western Division, at Tacoma, on the first Tuesdays of February and July.¹⁹¹

West Virginia constitutes one judicial district.¹⁹¹ The terms of the Circuit and District Courts for West Virginia are held at Wheeling, on the first days of March and September; at Clarksburg, on the first days of April and October; at Charleston, on the first days of May and November. When any of these dates fall on Sunday, the court will be held on the following Monday.¹⁹² The terms of the Circuit Court for the same district are also held at Parkersburg, on the tenth days of January and June. When either of these dates falls on Sunday, the term will commence on the following Monday.¹⁹³ Terms of both courts are also held at Martinsburg, on the first Tuesday in August.¹⁹⁴

In *Wisconsin* two districts, the Eastern and Western. The Western District includes the counties of Rock, Jefferson, Dane, Green, Grant, Columbia, Iowa, La Fayette, Sauk, Richland, Crawford, Vernon, La Cross, Monroe, Adams, Juneau, Buffalo, Chippewa, Dunn, Clark, Jackson, Eau Claire, Pepin, Marathon, Wood, Pierce, Polk, Portage, St. Croix, Trempealeau, Douglas, Barron, Burnett, Ashland, and Bayfield. The Eastern District includes the residue of the State.¹⁹⁵ The terms of the District and Circuit Courts for the Eastern District of Wisconsin are held at Oshkosh, on the second Tuesday of July, and at Milwaukee, on the first Mondays of January and October.¹⁹⁶ The same courts for the Western District of Wisconsin are held at Madison, on the first Monday in June, and at La Crosse, on the third Tuesday in September.¹⁹⁷

¹⁹⁰ 25 St. at L. ch. 180, p. 682; 26 St. at L. ch. 65, §§ 3 and 6.

¹⁹¹ U. S. R. S. § 531.

¹⁹² U. S. R. S. § 572; Act of March 9, 1878, ch. 27 (20 St. at L. 27; Act of Feb. 6, 1889 (25 St. at L. 655).

¹⁹³ U. S. R. S. § 658; Act of Dec. 21, 1878, ch. 9 (20 St. at L. 259).

¹⁹⁴ 25 St. at L. ch. 261, § 1, p. 151.

¹⁹⁵ U. S. R. S. § 550.

¹⁹⁶ U. S. R. S. §§ 572, 658; Act of June 16, 1874, ch. 286 (18 St. at L. 75).

¹⁹⁷ U. S. R. S. §§ 572, 658.

Wyoming constitutes one district, which is attached to the Eighth Circuit. The Circuit and District Courts thereof are held at the capital of the State, for the time being, on the first Mondays in April and November.¹⁹⁸

§ 26 a. **Jurisdiction of the Court of Claims.** — The Revised Statutes give the Court of Claims the jurisdiction over claims against the United States, as follows: —

“First. All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the government of the United States, and all claims which may be referred to it by either House of Congress.

“Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government of the United States, against any person making claim against the government in said court.

“Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility, on account of capture or otherwise, while in the line of his duty, of government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

“Fourth. Of all claims for the proceeds of captured or abandoned property, as provided by the Act of March 12, 1863, chapter 120, entitled ‘An Act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,’ or by the Act of July 2, 1864, chapter 225, being an act in addition thereto: *Provided*, that the remedy given in cases of seizure under the said acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said acts, from suit at common law, or any other mode of redress whatever, before any court other than said Court of Claims: (*Provided*, also, that the jurisdiction of the Court of Claims shall not extend to any claim against the United States growing out of the destruction or

¹⁹⁸ 26 St. at L. ch. 664, § 16, p. 225.

appropriation of, or damage to, property by the army or navy engaged in the suppression of the rebellion)." ¹

"All petitions and bills praying or providing for the satisfaction of private claims against the government, founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the government of the United States, shall, unless otherwise ordered by resolution of the House in which they are introduced, be transmitted by the Secretary of the Senate or the Clerk of the House of Representatives, with all the accompanying documents, to the Court of Claims." ²

"No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States." ³

The practice and jurisdiction of the Court of Claims are more fully explained in a subsequent chapter.⁴

§ 26 b. **Jurisdiction of the Court of Private Land Claims.**—The Court of Private Land Claims has jurisdiction to hear and decide private land claims according to the provisions of the Act of March 3, 1891,¹ as follows:—

When any person or persons or corporation, or their legal representatives, claiming lands within the limits of the territory derived by the United States from the republic of Mexico, and now embraced within the Territories of New Mexico, Arizona, or Utah, or within the States of Nevada, Colorado, or Wyoming, by virtue of any such Spanish or Mexican grant, concession, warrant, or survey as the United States are bound to recognize and confirm by virtue of the treaties of cession of said country by Mexico to the United States, which at the date of the passage of this act have not been confirmed by act of Congress, or otherwise finally decided upon by lawful authority, and which are not already complete and perfect, presents to the

§ 26 a. ¹ U. S. R. S. § 1059.

² U. S. R. S. § 1060.

³ U. S. R. S. § 1067.

⁴ *Infra*, ch. xxxi. See also 74 St. at L. ch. 359, p. 505; and *infra*, § 36.

§ 26 b. ¹ 26 St. at L. ch. 539, p. 854.

said court in the State or Territory where the land is situated and where the said court holds its sessions, or, in cases arising in the States or Territories in which the court does not hold regular sessions, at such place as may be designated by the rules of the court, a petition praying that the validity of his title or claim may be inquired into and decided.²

The court has jurisdiction to hear and determine all questions arising in cases before it relative to the title to the land the subject of such case, the extent, location, and boundaries thereof, and other matters connected therewith, fit and proper to be heard and determined, and by a final decree to settle and determine the question of the validity of the title and the boundaries of the grant or claim presented for adjudication, according to the law of nations, the stipulations of the treaty concluded between the United States and the republic of Mexico at the city of Guadalupe-Hidalgo, on February 2, 1848, or the treaty concluded between the same powers at the city of Mexico on December 30, 1853, and the laws and ordinances of the government from which it is alleged to have been derived, and all other questions properly arising between the claimants and the United States, which decree must in all cases refer to the treaty, law, or ordinance under which such claim is confirmed or rejected; and in confirming any such claim, in whole or in part, the court must in its decree specify plainly the location, boundaries, and area of the land the claim to which is so confirmed.³

When a petition is presented as aforesaid by any person or corporation claiming lands in any of the States or Territories in the United States above mentioned, under a title derived from the Spanish or the Mexican government that was complete and perfect at the date when the United States acquired sovereignty therein, praying the court for a confirmation of such title, the court must proceed to hear, try, and determine the validity of the same and the right of the claimant thereto, its extent, location, and boundaries, in the same manner and with the same powers as in other cases in the act mentioned.⁴ In such a case the confirmation of the title must be for so much land only as such perfect title shall be found to cover, always

² 26 St. at L. ch. 539, § 6, p. 856.

³ 26 St. at L. ch. 539, § 7, p. 857.

⁴ 26 St. at L. ch. 539, § 8, p. 857.

excepting any part of such land that may have been disposed of by the United States; and subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title. And no such confirmation of a claim or title has any effect other or further than as a release of all claims of title by the United States, and no private right of any person as between himself and other claimants in respect of any such lands is in any manner thereby affected.⁵

The head of the Department of Justice, whenever in his opinion the public interest or the rights of any claimant may require it, may cause the attorney of the United States in said court to file in said court a petition against the holder or possessor of any claim or land in any of the States or Territories of the United States, who shall not have voluntarily come in under the provisions of the act, stating in substance that the title of such holder or possessor is open to question, or stating in substance that the boundaries of any such land the claimant or possessor to or of which has not brought the matter into court, and praying that the title to any such land, or the boundaries thereof, if the title be admitted, be settled and adjudicated; and thereupon the court must, on such notice to such claimant or possessor as it may deem reasonable, proceed to hear, try, and determine the questions stated in such petition, or arising in the matter, and determine the matter according to law, justice, and the provisions of the act, but subject to all lawful rights adverse to such claimant or possessor, and subject in this respect to all the provisions of the statute applicable thereto.⁶

The jurisdiction of this court and the practice therein are more fully explained in a subsequent chapter.⁷

§ 27. Sources of Federal Equity Practice. — The Revised Statutes provide: —

“Sec. 917. The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling

⁵ 26 St. at L. ch. 539, § 8, pp. 857, 858.

⁷ *Infra*, ch. xxxii.

⁶ 26 St. at L. ch. 539, § 8, p. 858.

decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice to be used in suits in equity or admiralty, by the Circuit and District Courts.

“Sec. 918. The several Circuit and District Courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters, in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.”

Under these provisions the Supreme Court has from time to time promulgated ninety-four rules of equity practice; and most of the inferior courts have also adopted rules of their own. The ninetieth rule of the Supreme Court, which was promulgated in 1842, provides that, “in all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit Court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.” Of this rule Judge Sawyer said:—

“The jurisdiction of this court is derived from the Constitution and laws of the United States; and these rules are simply rules of practice, for regulating the mode of proceeding in the courts. They do not, and could not, properly, either limit or enlarge the jurisdiction of the court. The rule quoted simply regulates the practice in exercising the jurisdiction of the court in those respects wherein the rules adopted do not apply; but the practice of the High Court of Chancery is to be applied, not as controlling, but simply as furnishing just analogies to regulate the practice.”¹

By reference to these sources and the decisions of the courts resulting from them, the practice at equity in the courts of the United States must be determined.²

§ 27. ¹ *Lewis v. Shainwald*, 7 Saw. 403, 405.

² See *Ex parte Poultney v. City of La Fayette*, 12 Pet. 472, at p. 474.

CHAPTER II.

PERSONS WHO MAY BE PLAINTIFFS OR DEFENDANTS IN A SUIT
IN EQUITY.

§ 28. **General Rule as to Persons capable of being Plaintiffs.**—All persons may file a bill in equity in their own right, except alien enemies, infants, idiots, lunatics, married women, and possibly those who by the laws of a State have been declared civilly dead.

§ 29. **States as Plaintiffs.**—A State may sue as plaintiff in any court of the United States.¹ A State cannot sue in the Supreme Court of the United States to collect a judgment for a penalty recovered in the court of such State against a corporation chartered by another State.²

§ 30. **Alien Enemies as Plaintiffs.**—Subjects of a country at war with the United States cannot sue in the State or Federal courts before the conclusion of peace, unless they are residents of this country or within the jurisdiction of one of our allies.¹ If a complainant become an alien enemy after a suit has been begun, the defence may be interposed by plea or answer.² The effect of such a defence is then, however, merely to suspend the cause of action and suit, not to dismiss the bill.³

§ 31. **Married Women as Plaintiffs.**—A married woman originally could only sue when joined with her husband, unless he had deserted her, and was without the realm or civilly dead, when she could sue alone;¹ or unless the suit concerned her separate property, when she was obliged to sue by her next friend.² The next friend, however, was chosen by herself;³ and the husband was then usually made a party defendant, that he might

§ 29. ¹ *Ames v. Kansas*, 111 U. S. 449; *U. S. v. Louisiana*, 123 U. S. 32; § 14.

² *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265.

§ 30. ¹ *Wilcox v. Henry*, 1 Dall. 69; *Crawford v. The William Penn*, 1 Pet. C. C. 106; *Mumford v. Mumford*, 1 Gall. 366; *Clarke v. Morey*, 10 Johns. (N. Y.) 69; 2 Kent's Com. 63.

² *Bell v. Chapman*, 10 Johns. 183.

³ *Hutchinson v. Brock*, 11 Mass. 119; *Parkinson v. Wentworth*, 11 Mass. 26;

Levine v. Taylor, 12 Mass. 8; *Hamersley v. Lambert*, 2 Johns. Ch. (N. Y.) 508; *Ex parte Boussmaker*, 13 Ves. 71; *Wilcox v. Henry*, 1 Dall. 69; *Story's Eq. Pl.* § 54. But see *Mumford v. Mumford*, 1 Gall. 366.

§ 31. ¹ *Story's Eq. Pl.* § 61; *Countess of Portland v. Prodggers*, 2 Vern. 104.

² *Wake v. Parker*, 2 Keen, 70; *Story's Eq. Pl.* § 63.

³ *Story's Eq. Pl.* § 61; *Gamber v. Atlee*, 2 De G. & Sm. 745.

have an opportunity to assert any claim he might have to the subject-matter of the suit.⁴ In the courts of the United States, however, the rule was early laid down as follows: "Where the wife complains of the husband and asks relief against him she must use the name of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice within the discretion of the court."⁵ In the Circuit Courts held in the State of New York, where a married woman has substantially all the powers of a spinster, she may sue in equity, as if she were single, at least if she be a citizen of that State.⁶ When a suit has been begun by a married woman alone who should have sued by her next friend, leave to amend by adding to the title the name of a next friend will always be granted.⁷

§ 32. **Suits on behalf of Infants.**—The equity rules provide that "all infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons."¹ It has never been decided whether this changes the former practice, which was as follows: An infant could only sue by his next friend,² who might be any person that would undertake the suit in his behalf, subject, however, to the costs and the censure of the court, if it were improperly brought.³ The next friend might, at any time, be removed by the court either summarily or after a reference, if it seemed for the best interest of the infant to appoint another.⁴ It was doubtful whether insolvency and consequent inability to respond for costs was, in itself, a ground for the next friend's removal.⁵ That might, however, be a reason for an order directing him to give security for costs.⁶ The court might, at any time, order a reference to a

⁴ Sigel v. Phelps, 7 Sim. 239; Wake v. Parker, 2 Keen, 70; Story's Eq. Pl. § 63.

⁵ Mr. Justice McLean in Bein v. Heath, 6 How. 228, 240. See Douglas v. Butler, 6 Fed. R. 228.

⁶ Lorillard v. Standard Oil Co., 2 Fed. R. 302. But see Taylor v. Holmes, 14 Fed. R. 499, 514; United States v. Pratt Coal & Coke Co., 18 Fed. R. 708; O'Hara v. MacConnell, 93 U. S. 150.

⁷ Douglas v. Butler, 6 Fed. R. 228; Taylor v. Holmes, 14 Fed. R. 499.

§ 32. ¹ Rule 87.

² Rule 87; Story's Eq. Pl. § 57; Dodgeon v. Watson, 23 Fed. R. 161; Bradwell v. Weeks, 1 J. Ch. (N. Y.) 325.

³ Campbell v. Campbell, 2 M. & C. 25, at page 30; Sale v. Sale, 1 Beav. 586; Starten v. Bartholomew, 6 Beav. 143.

⁴ Nalder v. Hawkins, 2 M. & K. 243; Russell v. Sharpe, 1 Jac. & W. 482.

⁵ Anon., 1 Ves. Jr. 409.

⁶ Fulton v. Roosevelt, 1 Paige (N. Y.), 178, at page 180.

master, to determine the propriety of a suit; and, if it appeared to have been brought against the infant's interest, would stay proceedings in it or dismiss the bill, with costs to be paid by the next friend.⁷ This could be done even without a reference.⁸ No such reference would, it seems, be ordered at the request of the next friend himself,⁹ unless there were another cause pending by reason of which the infant's property was subject to the control of the court, when such a reference might be ordered at the instigation of a next friend, and he be paid his costs out of the estate even if the bill were finally dismissed.¹⁰ An application to dismiss a bill as improperly filed on behalf of an infant might be made by a person "as next friend for the purpose of this application,"¹¹ or by a defendant to the bill.¹² It seems that any motion clearly for the interest of an infant complainant could be made by a next friend for the purpose of the application, when the next friend who filed the bill refused to move.¹³ If two suits were instituted on behalf of the same infant for the same purpose by two next friends, the court would direct a master to inquire which is most for the infant's benefit.¹⁴ A bill might be filed by a next friend on behalf of a child still in its mother's womb.¹⁵

If an infant were made co-plaintiff with others, and it appeared that it would be more for his advantage that he should be made a defendant, an order to strike out his name as plaintiff, and to make him a defendant, might be obtained upon motion.¹⁶ When a bill was filed in behalf of an infant, his coming of age did not abate the suit; but he might then elect whether he would proceed with it or not.¹⁷ If he chose to go on with the suit, all further proceedings could be carried on without any amendment or the filing of a supplemental bill.¹⁸ He was then liable for all costs of the suit, as if he had filed the bill after he came of age.¹⁹ Otherwise, he was not personally chargeable with costs;²⁰ unless

⁷ *Da Costa v. Da Costa*, 3 P. Wms. 110; *Nalder v. Hawkins*, 2 M. & K. 243; *Sale v. Sale*, 1 Beav. 586.

⁸ *Sale v. Sale*, 1 Beav. 586.

⁹ *Jones v. Powell*, 2 Mer. 141.

¹⁰ *Taner v. Ivie*, 2 Ves. Sen. 466.

¹¹ *Guy v. Guy*, 2 Beav. 460.

¹² *Fox v. Suwerkrop*, 1 Beav. 583.

¹³ *Furtado v. Furtado*, 6 Jur. 227; *Cox v. Wright*, 9 Jur. (N. S.) 981; *Guy v. Guy*, 2 Beav. 460.

¹⁴ *Calvert on Parties* (2d ed.), 418.

¹⁵ *Luterel's Case*, cited Prec. Ch. 50; *Musgrave v. Parry*, 2 Vern. 710.

¹⁶ *Tappen v. Norman*, 11 Ves. 563.

¹⁷ *Guy v. Guy*, 2 Beav. 460.

¹⁸ *Hoffman's Ch. Pr.* 60; *Daniell's Ch. Pr.* (2d Am. ed.), 102.

¹⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 102.

²⁰ *Waring v. Crane*, 2 Paige (N. Y.),

he made a motion to dismiss the bill, which it seems could only be done upon the payment of costs by himself,²¹ if he could not establish that the bill was improperly filed by his next friend.²² If the next friend died during the infant's minority, and the latter took no step in the cause after he had come of age, the defendant might have the bill dismissed, but without costs, since there would then be no one living who was liable to pay them.²³

§ 33. **Suits on behalf of Idiots, Lunatics, and Persons of Weak Mind.** — Idiots and lunatics sue by their committees or guardians, if they have any, otherwise by next friend.¹ It is the usual practice to join them as plaintiffs with their representatives, though it might be held unnecessary to do so when one has a committee, authorized by statute to sue in his name.² If the interest of the committee be adverse to that of his ward, the latter should sue by a next friend.³ Although the practice is unsettled, it would be advisable to have the next friend appointed by the court.⁴ If a plaintiff become a lunatic after the institution of a suit, a supplemental bill may be filed in the joint names of the lunatic and of the committee of his estate, which will answer the same purpose as a bill of revivor in procuring the benefit of former proceedings.⁵ If a committee die and a new committee is appointed after a suit has been instituted by the former for the benefit of his idiot or lunatic, the proper way of continuing the suit is by a supplemental bill filed by the idiot or lunatic and the new committee.⁶ In England, a committee, usually before the institution of a suit, prayed the sanction of the Lord Chancellor by a petition, which was often referred to a master.⁷ If a person of full age is neither an idiot nor a lunatic, and is yet incapable of managing his affairs, the court may appoint a next friend to sue for him.⁸ If a bill has been filed in the name of a plaintiff, who, at the time of filing it, is in a state of mental incapacity, it may, on motion, be

²¹ *Waring v. Crane*, 2 Paige (N. Y.), 79.

²² *Turner v. Turner*, 2 Stra. 708.

§ 33. ¹ Rule 87; *Hoffman's Ch. Pr.* 61.

² See *Ortley v. Messere*, 7 Johns. Ch. (N. Y.) 139; *Harrison v. Rowan*, 4 Wash. C. C. 202; *Palmer, Attorney General v. Parkhurst*, 1 Chan. Cas. 112; *Gorham v. Gorham*, 3 Barb. Ch. (N. Y.) 24; *Hoffman's Ch. Pr.* 61; *Story's Eq. Pl.* § 65, and notes.

³ Compare *Attorney-General v. Tiler*, 1 Dick. 378; *Hoffman's Ch. Pr.* 61.

⁴ Compare *Attorney-General v. Tiler*, 1 Dick. 378; *Hoffman's Ch. Pr.* 61; *Story's Eq. Pl.* § 64, and notes.

⁵ See *Brown v. Clark*, 3 Woodeson's Lect. 378; *Daniell's Ch. Pr.* 108.

⁶ *In re Reynolds*, Shelf. on Lun. 417; *Daniell's Ch. Pr.* 108.

⁷ *In re Webb*, Shelf. on Lun. 417; *Daniell's Ch. Pr.* 108.

⁸ *Wartnaby v. Wartnaby*, Jac. 377; *Owing's Case*, 1 Bland (Md.), 370, at page 373; *Story's Eq. Pl.* § 66.

taken off the file.⁹ If, however, after a suit has been properly instituted, a plaintiff becomes imbecile, the bill cannot for that reason be taken off the file.¹⁰

§ 34. **Capacity of Foreign Executors, Administrators, and Receivers to sue.** — Foreign executors and administrators, under which term are included those appointed in other States than that where the court is held, cannot sue until they have taken out ancillary letters of administration.¹ A foreign executor may sue without ancillary letters when the title is vested in him as trustee by devise.² It is doubtful whether or not foreign receivers can sue.³ The better rule would seem to be, that they can always sue, no matter where, unless by so doing they would appropriate assets upon which domestic creditors would otherwise have a prior lien, or otherwise impugn the public policy of the State in which the action is brought.⁴

§ 35. **Who may be Defendants to a Bill in Equity.** — All persons may be made defendants to a bill in equity except the United States;¹ foreign States and sovereigns for acts done in a political capacity;² "one of the United States by citizens of another State, or by citizens or subjects of any foreign State;"³ receivers appointed by State courts without the leave of such courts;⁴ and foreign executors and administrators,⁵ unless they have assets within the jurisdiction of the court where the bill is filed.⁶ Whether a suit can be brought against the President of the United States is undecided.⁷

§ 36. **The United States as a Defendant.** — The United States may waive its exemption from suit by statute,¹ but not by the

⁹ *Wartnaby v. Wartnaby*, Jac. 377; *Story's Eq. Pl.* § 66.

¹⁰ *Wartnaby v. Wartnaby*, Jac. 377.

§ 34. ¹ *Fenwick v. Sears*, 1 Cranch, 259; *Dixon v. Ramsay*, 3 Cranch, 319; *Doe v. McFarland*, 9 Cranch, 151; *Kerr v. Moon*, 9 Wheat. 565; *Mason v. Hartford, Providence, & Fishkill R. R. Co.*, 19 Fed. R. 53; *Duchesse d'Auby v. Porter*, 41 Fed. R. 68; *Johnson v. Powers*, 139 U. S. 156, 158.

² *De Forest v. Thompson*, 40 Fed. R. 375.

³ *Booth v. Clark*, 17 How. 322; *Brigham v. Luddington*, 12 Blatchf. 237; *Olney v. Tanner*, 10 Fed. R. 101; *Hazard v. Durant*, 19 Fed. R. 471, 476.

⁴ *Ex parte Norwood*, 3 Biss. 504; *Hunt v. Jackson*, 5 Blatchf. 349; *Cuykendall v. Miles*, 10 Fed. R. 342; *Hurd v. Eliza-*

beth, 41 N. J. Law (12 Vroom) 1; *Toronto General Trust Co. v. C. B. & Q. R. R. Co.*, 123 N. Y. 37, 47.

§ 35. ¹ *Carr v. U. S.*, 98 U. S. 433.

² *Duke of Brunswick v. King of Hanover*, 6 Beav. 1; *Hullett v. King of Spain*, 2 Bligh N. R. 31.

³ 11th Amendment to Constitution.

⁴ *Barton v. Barbour*, 104 U. S. 126; *Thompson v. Scott*, 4 Dill. 508; *Express Co. v. Railroad Co.*, 99 U. S. 191.

⁵ *Vaughn v. Northrup*, 15 Pet. 1; *Story's Eq. Pl.* § 179.

⁶ *Sandilands v. Innes*, 3 Sim. 263; *McNamara v. Dwyer*, 7 Paige (N. Y.), 239; *Campbell v. Tousey*, 7 Cow. (N. Y.) 64.

⁷ See *Miss. v. Johnson*, 4 Wall. 475.

§ 36. ¹ *United States v. Clarke*, 8 Pet. 436; *The Siren*, 7 Wall. 152.

act of any of its officers.² When, however, the United States institute a suit, it waives its exemption so far as to allow a presentation by the defendant of any set-off, legal and equitable, to the extent of the demand made or property claimed; and when it proceeds *in rem*, it opens to consideration all claims and equities in regard to the property libelled.³ It has been held that ejectment will lie against public officers holding land for governmental purposes in the name of the United States;⁴ but it was intimated that an injunction will not be granted to enjoin an officer of the United States from infringing a patent while acting in its service, and that the remedy of the patentee, if it exists at all, is in the Court of Claims.⁵ A statute passed in 1887 provides that in "all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable,⁶ . . . the District Courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters,⁷ where the amount of the claim does not exceed one thousand dollars; and the Circuit Courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars, and does not exceed ten thousand dollars. All cases brought and tried under the provisions of this Act shall be tried by the court without a jury,⁸ . . . provided, however, that nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court.

² Carr v. United States, 98 U. S. 433.

³ Mr. Justice Field in *The Siren*, 7 Wall. 152, 154. A more liberal rule against the government is suggested in *Fifth National Bank v. Long*, 7 Biss. 502; *Elliot v. Van Voorst*, 3 Wall. Jr., 299; *Briggs v. The Light Boats*, 11 Allen (Mass.), 157.

⁴ *United States v. Lee*, 106 U. S. 196.

⁵ *James v. Campbell*, 104 U. S. 359, 359; *Hollister v. Benedict Manuf. Co.*, 113 U. S. 59, 67.

⁶ Act of March 3, 1887, 24 St. at L. ch. 359, § 1, p. 505.

⁷ Act of March 3, 1887, 24 St. at L. ch. 359, § 2, p. 505.

⁸ Act of March 3, 1887, 24 St. at L. ch. 359, § 1, p. 505.

department, or commission authorized to hear or determine the same.”⁹ The same courts are similarly given jurisdiction over “all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government,” in such courts.¹⁰ Under this act a suit may be brought to recover the purchase price paid upon void entries of public land.¹¹ A suit may be brought against the United States by a contractor for extra work done by him under the direction of the government’s agent, and for damages for an improper interference by such agent with the fulfilment of the contract.¹² Where a suit was brought by an army officer against the United States for indemnity on account of a judgment recovered against and paid by him on account of his seizure and use of a boat for the benefit of the government, under the orders of his superior officer, it was held that, if the liability of the United States was in tort, no action would lie, and that if the liability was upon an implied contract, it arose when the seizure was made, not when the judgment was recovered.¹³ A public officer may sue the United States to recover money due him for the performance of his official acts.¹⁴ No suit will lie under this act to enforce specific performance of a contract, nor one founded upon a claim which is not a claim for money.¹⁵ “In section 1 of the Act of March 3, 1887, c. 359, the words ‘hear and determine’ are used four times,—once as applied to the Court of Claims, twice as applied to that court and to the Circuit and District Courts, and again as applied to any court, department, or commission. These words must be taken to be used in each instance in the same sense, and as implying an adjudication conclusive as between the parties, in the nature of a judgment or award. The proviso that nothing in this section shall be construed as giving to either of the courts named in the act juris-

⁹ 24 St. at L. ch. 359, § 1, p. 505.

¹⁰ 24 St. at L. ch. 359, § 1, p. 505.

¹¹ *Emmons v. United States*, 42 Fed. R. 26.

¹² *Bowe v. United States*, 42 Fed. R. 761.

¹³ *Carpenter v. United States*, 42 Fed. R. 264. In *Junker v. Fobes*, 45 Fed. R. 840, 841, Judge Toulmin said, “If the cause of action, as stated in the declara-

tion, arises from a breach of promise, the action is *ex contractu*; but if the cause of action arises from a breach of duty, growing out of the contract, it is *ex delicto*, and case.”

¹⁴ *United States v. McDermott*, 140 U. S. 157.

¹⁵ *United States v. Jones*, 131 U. S. 1, 19.

diction to hear and determine any claims 'which have heretofore been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same,' must be limited to a rejection of a claim, or an adverse report thereon, by a court, department, or commission which determines the rights of the parties, such as the approval by the Secretary of the Treasury of an account of expenses under the captured and abandoned property acts,¹⁶ or the decision of an international commission.¹⁷ Moreover, the Court of Claims, even before the passage of the Act of 1887, had jurisdiction of claims under an act of Congress or under a contract, and could therefore hear and determine claims for legal salaries or fees.¹⁸ We cannot believe that the Act of 1887, entitled 'An Act to provide for the bringing of suits against the government of the United States,' the manifest scope and purpose of which are to extend the liability of the government to be sued, was intended to take away a jurisdiction already existing, and to give to the decisions of accounting officers an authority and effect which they never had before."¹⁹ The same act regulates the practice in such suits in the Circuit and District Courts as follows: The plaintiff must file a petition duly verified with the clerk of the respective courts having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and must pray the court for a judgment or decree based upon the facts and the law.²⁰ The plaintiff must cause a copy of his petition, after filing the same, to be served upon the district attorney of the United States in the district wherein suit is brought, and must mail another copy by registered letter to the Attorney-General of the United States; and must thereupon file with the clerk of the court wherein the suit is instituted, an affidavit of such service and mailing.²¹ The United States

¹⁶ *United States v. Johnson*, 124 U. S. 36; 8 Sup. Ct. Rep. 446. *Rep.* 117; *United States v. Jones*, 131 U. S. 1, 13.

¹⁷ *Meade v. United States*, 9 Wall. 691.

¹⁸ *Mitchell v. United States*, 18 Ct. Cl. 281; s. c. 109 U. S. 146; *Adams v. United States*, 29 Ct. Cl. 115; *United States v. McDonald*, 128 U. S. 471; 9 Sup. Ct.

¹⁹ Mr. Justice Gray, *Colt, C. J.*, concurring, in *Harmon v. United States*, 43 Fed. R. 560, 564, 565.

²⁰ 24 St. at L. ch. 359, § 5, p. 506.

²¹ 24 St. at L. ch. 359, § 6, p. 506.

appears by the district attorney, and is allowed sixty days, or as much more time as the court may in its discretion allow, within which to file a plea, answer, or demurrer; "and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defence whatsoever, of the government in the premises: provided, that should the district attorney neglect or refuse to file the plea, answer, demurrer, or defence, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises." But the plaintiff cannot have a judgment or decree in his favor unless he establishes the same by proof satisfactory to the court.²² In the Court of Claims the claimant must "in all cases fully set forth in his petition the claim, the action thereon in Congress or by any of the departments, if such action has been had; what persons are owners thereof or interested therein; when and upon what consideration such persons became so interested; that no assignment or transfer of said claim, or of any part thereof, or interest therein, has been made, except as stated in the petition; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and off-sets; that the claimant, and, where the claim has been assigned, the original and every prior owner thereof, if a citizen, has at all times borne true allegiance to the government of the United States, and, whether a citizen or not, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government; and that he believes the facts as stated in said petition to be true. And the said petition shall be verified by the affidavit of the claimant, his agent or attorney."²³ It is the duty of the court, acting under the Act of 1887, to cause a written opinion to be filed in the cause, "setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts."²⁴ If the United States puts in issue the right of the plaintiff to recover, the court may in its discretion allow costs to the prevailing party, which, however, cannot exceed what is actually incurred for witnesses, "and for summoning the same,

²² 24 St. at L. ch. 359, § 6, p. 506.

²⁴ 24 St. at L. ch. 359, § 7, p. 506.

²³ U. S. R. S. § 1072.

and fees paid to the clerk of the court.”²⁵ From the date of final judgment or decree against the government, interest is allowed “to be computed thereon, at the rate of four per centum per annum, until the time where an appropriation is made for the payment of the judgment or decree.”²⁶ Before the creation of the Circuit Courts of Appeal, an appeal or writ of error under this act was heard by and returnable to the Supreme Court,²⁷ not to the Circuit Court.²⁸ The plaintiff can appeal where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of the court below, under U. S. R. S. § 1089.²⁹ Such appeal or writ of error should be taken within ninety days after the judgment is rendered.³⁰ An appeal or writ of error may be taken, irrespective of the amount involved, by the district attorney, at the direction of the Attorney-General, within six months after the judgment or decree.³¹ Otherwise, the practice in all courts in suits brought under this statute is similar to that in other suits, with “such additions and modifications as said courts may adopt.”³²

§ 37. **Liability of States to Suits by Private Persons.**—Under the Constitution of the United States as originally adopted, it was provided that the judicial power of the United States should extend to controversies “between a State and citizens of another State.”¹ This was held to subject a State to liability to an action by a citizen of another State.² This decision was opposed to the views of Marshall and others, as expressed in the conventions which ratified the Constitution,³ and was repugnant to the feelings of the people. Consequently, the Eleventh Amendment was adopted. This enacted that “the Judicial Power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State.” It has effectually prevented the successful prose-

²⁵ 24 St. at L. ch. 359, § 15, p. 508.

²⁶ 24 St. at L. ch. 359, § 10, p. 507.

²⁷ *United States v. Davis*, 131 U. S. 36.

²⁸ *Strong v. United States*, 40 Fed. R. 193.

²⁹ 24 St. at L. ch. 359, § 9, p. 506; U. S. R. S. § 707; *United States v. Davis*, 131 U. S. 36, 39; *Strong v. United States*, 40 Fed. R. 183.

³⁰ 24 St. at L. ch. 359, § 9, p. 506;

U. S. R. S. § 708. But see *United States v. Davis*, 131 U. S. 36, 39.

³¹ 24 St. at L. ch. 359, § 10, p. 507; *United States v. Davis*, 131 U. S. 36, 39.

³² 24 St. at L. ch. 359, § 4, p. 506.

§ 37. ¹ Art. III, Sec. 2.

² *Chisholm v. Georgia*, 2 Dall. 419.

³ See *Elliott's Debates*.

cution by a private individual of a suit against a State as a party defendant. Cases have, however, often arisen where, although a State was not a formal party, yet it had rights which it claimed would be affected by the determination of a suit before the court. To accurately determine the jurisdiction of the Federal courts in these cases has been a very difficult and delicate matter, and the questions which thus constantly arise are hard to answer. The fact that a State is not named as a party to the record does not of itself remove a case from the terms of the Eleventh Amendment.⁴ Whether a State is an actual party in the sense of the prohibition must be determined by a consideration of the nature of the case as presented by the whole record.⁵ The subject was recently discussed by Mr. Justice Miller, with the apparent approval of a majority of the Supreme Court: "It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States, by virtue of the original jurisdiction conferred on this court by the Constitution. This principle is conceded in all the cases; and whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But in the desire to do that justice which in many cases the courts can see will be defeated by an unwarranted extension of this principle, they have in some instances gone a long way in holding the State not to be a necessary party, though some interest of hers may be more or less affected by the decision. In many of these cases the action of the court has been based upon principles whose soundness cannot be disputed. A reference to a few of them may enlighten us in regard to the case now under consideration. 1. It has been held in a class of cases, where property of the State, or property in which the State has an interest, comes before the court and under its control, in the regular course of judicial administration, without being forcibly taken

⁴ *Elliott v. Wiltz*, 107 U. S. 711; *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Hagood v. Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443.

⁵ *Poindexter v. Greenhow*, 114 U. S. 270, 287; *In re Ayers*, 123 U. S. 443, 492.

from the possession of the government, the court will proceed to discharge its duty in regard to that property, and the State, if it choose to come in as plaintiff, as in prize cases, or to intervene in other cases where she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court.⁶ 2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him.⁷ 3. A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well-defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have a distinct interest capable of enforcement by judicial process. Of this class are writs of mandamus to public officers."⁸ "But in all such cases, from the nature of the remedy of mandamus, the duty to be performed must be merely ministerial, and must involve no element of discretion to be exercised by the officer. It has, however, been much insisted on that in this class of cases, where it shall be found necessary to enforce the rights of the individual, a court of chancery may, by a mandatory decree or by an injunction, compel the performance of the appropriate duty, or enjoin the officer from doing that which is inconsistent with that duty and with plaintiff's

⁶ *Cunningham v. Macon & Brunswick* 363; *United States v. Lee*, 106 U. S. R. R. Co., 109 U. S. 446, 451, 452; citing 196; *Virginia Coupon Cases*, 114 U. S. on this point *The Siren*, 7 Wall. 152, 157; 269. *The Davis*, 19 Wall. 15, 20; *Clark v. Barnard*, 108 U. S. 436.

⁷ *Cunningham v. Macon & Brunswick* 363; *United States v. Lee*, 106 U. S. R. R. Co., 109 U. S. 446, 452, 453; citing 196; *Virginia Coupon Cases*, 114 U. S. 269. *Marbury v. Madison*, 1 Cranch, 137; *Kendall v. Stokes*, 3 How. 87; *United States v. Schurz*, 102 U. S. 378; *United States v. Boutwell*, 17 Wall. 604. See *Rolston v. Missouri Fund Commissioners*, 120 U. S. 390, 411.

⁸ *Cunningham v. Macon & Brunswick* 363; *United States v. Lee*, 106 U. S. R. R. Co., 109 U. S. 446, 451, 452; citing 196; *Virginia Coupon Cases*, 114 U. S. 269. *The Siren*, 7 Wall. 152, 157; *The Davis*, 19 Wall. 15, 20; *Clark v. Barnard*, 108 U. S. 436.

rights in the premises. Perhaps the strongest assertion of this doctrine is found in the case of *Davis v. Gray*, 16 Wall. 203. In that case, the State of Texas, having made a grant of the alternate sections of land along which a railroad should thereafter be located, and the railroad company having surveyed the land at its own expense and located its road through it, the commissioner of the State land office and the governor of the State were, in violation of the rights of the company, selling and delivering patents for the sections to which the company had an undoubted vested right. The circuit court enjoined them from doing this by its decree, which was affirmed in this court.”⁹ “But it is clear that in enjoining the governor of the State in the performance of one of his executive functions, the case goes to the verge of sound doctrine, if not beyond it, and that the principle should be extended no further.”¹⁰ Nor was there in that case any affirmative relief granted by ordering the governor and land commissioner to perform any act towards perfecting the title of the company. The case of *The Board of Liquidation v. McComb*, 92 U. S. 531, is to the same effect. The board of liquidation was charged by the statute of Louisiana with certain duties in regard to issuing new bonds of the State in place of old ones which might be surrendered for exchange by the holders of the latter. The amount of new bonds to be issued was limited by a constitutional provision. McComb, the owner of some of the new bonds already issued, filed his bill to restrain the board from issuing that class of bonds in exchange for a class of indebtedness not included within the purview of the statute, on the ground that his own bonds would thereby be rendered less valuable. This court affirmed the decree of the circuit court enjoining the board from exceeding its power in taking up by the new issue a class of State indebtedness not within the provisions of the law on that subject. In the opinion in that case the language used by Mr. Justice Bradley well and truly thus expresses the rule and its limitations: “The objections to proceeding against State officers by mandamus or injunction are, first, that it is in effect proceeding against the State

⁹ *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446, 453. See also *Pennoyer v. McConaughy*, 140 U. S. 1; s. c. 43 Fed. R. 196; s. c. 43 Fed. R. 339.

¹⁰ *Davis v. Gray*, 16 Wall. 203, was followed and approved as to the point questioned here in *Pennoyer v. McConaughy*, 140 U. S. 1; s. c. 43 Fed. R. 196; s. c. 43 Fed. R. 339.

itself ; and, second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these can be done. A State, without its consent, cannot be sued as an individual ; and a court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But it has been settled that where a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain a personal injury by such refusal may have a mandamus to compel performance ; and when such duty is threatened to be violated by some official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.' It is believed that this is as far as the court has gone in granting relief in this class of cases. The case of *Osborne v. Bank of the United States*, 9 Wheat. 738, often referred to, was decided upon this principle, and goes no further ; for, in that case, a preliminary injunction of the court forbidding a State officer from placing the money of the bank, which he had seized, in the treasury of the State, having been disregarded, the final decree corrected this violation of the injunction, by requiring the restoration of the money thus removed."¹¹ "On the other hand, in the cases of *Louisiana v. Jumel*, and *Elliott v. Wiltz*, 107 U. S. 711, decided at the last term, very ably argued and very fully considered, the court declined to go any further. In the first of these cases the owners of the new bonds issued by the board of liquidation mentioned in *McComb's* case, above cited, brought the bill in equity in the Circuit Court of the United States, to compel the auditor of the State and the treasurer of the State to pay, out of the treasury of the State, the overdue interest coupons on their bonds, and to enjoin them from paying any part of the taxes collected for that purpose for the ordinary expenses of the government. They at the same time applied to the State court for a writ of mandamus to the same officers, which suit was then removed into the Circuit Court of the United States. In this they asked that these officers be commanded to pay, out of the moneys in the treasury, the taxes which they main-

¹¹ See also *Pennoyer v. McConnaughy*, 135 U. S. 662, 684 ; *Louisiana v. Jumel*, 140 U. S. 1 ; s. c. 43 Fed. R. 196 ; s. c. 107 U. S. 711.
43 Fed. R. 336 ; *McGahey v. Virginia*,

tained had been assessed for the purpose of paying the interest on their bonds, and to pay such sums as had already been diverted from that purpose to others by the officers of the government. The Circuit Court refused the relief asked in such case, and this court affirmed the judgment of that court.”¹² . . . “We think the foregoing cases mark, with reasonable precision, the limit of the power of the courts in cases affecting the rights of the State or Federal governments in suits to which they are not voluntary parties. In actions at law, of which mandamus is one, where an individual is sued, as for injuries to persons or property, real or personal, or in regard to a duty which he is personally bound to perform, the government does not stand behind him to defend him. If he has the authority of law to sustain him in what he has done, like any other defendant he must show it to the court and abide the result. In either case the State is not bound by the judgment of the court, and generally its rights remain unaffected. It is no answer for the defendant to say, I am an officer of the government and acted under its authority, unless he shows the sufficiency of that authority. Courts of Equity proceed upon different principles in regard to parties.”¹³ “Two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented. The first class is where the suit is brought against the officers of the State, as representing the State’s action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts.¹⁴ The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them

¹² *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446, 454, 455. See also *Governor of Georgia v. Madrazo*, 1 Pet. 124; *Hagood v. Southern*, 117 U. S. 52; *North Carolina v. Temple*, 134 U. S. 22; *Louisiana, ex rel. N. Y. Guaranty & Indemnity Co., v. Steele*, 134 U. S. 230.

¹³ *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446, 455. See *Virginia Coupon Cases*, 114 U. S. 269.

¹⁴ *Pennoyer v. McConnaughy*, 140 U. S. 1, 9, 10, *per Mr. Justice Lamar*.

in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, . . . is not, within the meaning of the Eleventh Amendment, an action against the State."¹⁵

In accordance with these views, it was held that a suit by a bondholder against the officers of a State and a railroad company whose bonds he held, to have a sale of mortgaged property to the Governor of Georgia, claiming to act in his official capacity, declared void upon the ground "that the governor was not authorized to bid in said property for the State, and the State had no constitutional power to make the purchase," could not be maintained.¹⁶ A bill, the object of which is by injunction, indirectly, to compel the specific performance of a contract by a State by forbidding all those acts and doings which constitute breaches of the contract, is a suit against the State.¹⁷ Such was held to be a suit to enjoin the Attorney-General, auditor, and various Commonwealth attorneys of the State of Virginia from bringing suits in the name of that State and in its courts against persons who had tendered in payment of taxes tax-receivable coupons of Virginia bonds.¹⁸ A State cannot without its consent be sued by one of its own citizens, even on a cause of action arising under the Constitution and laws of the United States.¹⁹ It has been held that a State is not a necessary party to a suit by the United States to cancel a contract between it and a private individual for the sale of lands, obtained by the State from the plaintiff by mistake or fraud.²⁰ A county is subject to suit in a court of the United States; and a State law cannot divest a Federal court of jurisdiction over such a suit.²¹

¹⁵ *Pennoyer v. McConaughy*, 140 U. S. 1, 19.

¹⁶ *Cunningham v. Macon & Brunswick R. R. Co.*, 105 U. S. 445. See, however, the dissenting opinion of Field and Harlan, JJ. See also *Hagood v. Southern*, 117 U. S. 52; *Christian v. Atlantic & N. C. R. R. Co.*, 133 U. S. 233.

¹⁷ *In re Ayers*, 123 U. S. 443, 502, *per* Matthews, J.

¹⁸ *In re Ayers*, 123 U. S. 443. But see *Tuchman v. Welch*, 42 Fed. R. 518; reversed s. c. 45 Fed. R. 283; and criticised in 24 Am. Law Review, 661.

¹⁹ *Hans v. Louisiana*, 134 U. S. 1; *North Carolina v. Temple*, 134 U. S. 22.

²⁰ *Williams v. United States*, 138 U. S. 514, 516.

²¹ *Lincoln County v. Luning*, 133 U. S. 529.

§ 38. **Liability of a State to a Suit by another State.**—The Constitution provides that “the judicial power shall extend . . . to controversies between two or more States ; . . . and between a State, or the citizens thereof, and foreign States, citizens or subjects.”¹ The Eleventh Amendment has not taken away the liability of one of the United States to a suit by another such State or a foreign State. Such jurisdiction, however, is confined to controversies concerning rights affecting property ; not to those merely affecting political rights.² It includes controversies concerning boundaries between different States, even though the complainant claim no title other than that of sovereignty and jurisdiction over the lands in question.³ For, “in this country, where feudal tenures are abolished, in cases of escheat the State takes the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction.”⁴ If, however, in a bill which prays relief against a threatened invasion of rights purely political in their nature, a threatened injury to property be stated “only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief ;” and “this matter of property is neither stated as an independent ground, nor is it noticed at all in the prayers for relief ;” the bill will be dismissed.⁵ A suit cannot be maintained when brought by one State against another to enforce the payment by the latter of its bonds originally held by citizens of the former State, and assigned by them to it solely for the purpose of collection.⁶ A tribe of Indians domiciled within the borders of the United States does not constitute a foreign State within the meaning of the Constitution.⁷

§ 39. **Suits against Infants.**—An infant when sued should be provided by the court with a guardian *ad litem*.¹ For an omission to appoint a guardian *ad litem*, a decree against an infant will be reversed upon appeal.² An application for the appoint-

§ 38. ¹ Art. III. § 2.

² *Cherokee Nation v. Georgia*, 5 Pet. 1 ; *Georgia v. Stanton*, 6 Wall. 50 ; *Georgia v. Grant*, 6 Wall. 241.

³ *Rhode Island v. Massachusetts*, 12 Pet. 657 ; *Missouri v. Iowa*, 7 How. 660 ; *Florida v. Georgia*, 17 How. 478 ; *Alabama v. Georgia*, 23 How. 505 ; *Virginia v. West Virginia*, 11 Wall. 39.

⁴ *Georgia v. Stanton*, 6 Wall. 50, 73.

⁵ *Georgia v. Stanton*, 6 Wall. 50, 77.

⁶ *New Hampshire v. Louisiana*, 108 U. S. 76.

⁷ *Cherokee Nation v. Georgia*, 5 Pet. 1. § 39. ¹ Rule 87 ; *Bank of the United States v. Ritchie*, 8 Pet. 128, 144. See *Woolridge v. McKenna*, 8 Fed. R. 650, 670.

² *O'Hara v. MacConnell*, 93 U. S. 150.

ment of a guardian *ad litem* for an infant should be made by petition, which, if the appointment of a particular person is desired, should state his name and his consent to act as such.³ The court will usually appoint the infant's general guardian or "the nearest relative not concerned, in point of interest, in the matter in question;"⁴ but the choice of the guardian rests in the sound discretion of the court, and only in an extraordinary case would a decree be reversed for an error in this respect.⁵ The interests of an infant are guarded jealously by the court, which will not hold him bound by any admission made by him or in his behalf, whether in the pleadings⁶ or otherwise.⁷ The guardian *ad litem* is responsible for the propriety of the defence.⁸ He must pay costs for scandal;⁹ and he may be removed by the court at any time.¹⁰ This may be done if he is unable or unwilling to pay the expenses of the defense.¹¹ If no person of substance is willing to serve for the infants, the court "might suspend further proceedings until it could send a next friend or guardian *ad litem* to the State courts having jurisdiction of their person and property, to secure such guardianship as would protect them."¹² Infants may defend *in forma pauperis*; but, except in very extraordinary circumstances, their expenses will not be advanced out of a fund in the hands of a receiver.¹³ A guardian *ad litem* may recoup his expenses from the infant's property.¹⁴ According to the English practice, an appearance could be entered for an infant before a guardian *ad litem* had been appointed.¹⁵

§ 40. Suits against Idiots, Lunatics, and Persons of Weak Mind. — Idiots and lunatics defend by guardians *ad litem*, appointed for them by the court.¹ A committee will usually be appointed guar-

³ *Rhineland v. Sanford*, 3 Day (2d Circuit, Conn.), 279.

⁴ *Bank of the United States v. Ritchie*, 8 Pet. 128, 144; Story's Eq. Pl. § 70; Calvert on Parties, Book III. ch. xxxi.

⁵ *Bank of the United States v. Ritchie*, 8 Pet. 128, 144.

⁶ *Bank of the United States v. Ritchie*, 8 Pet. 128, 144, 145; *Walton v. Coulson*, 1 McLean, 125; s. c. *Coulson v. Walton*, 9 Pet. 62, 84; *Hawkins v. Luscombe*, 2 Swanst. 375, 390; *Savage v. Carroll*, 1 Ball & B. 553.

⁷ *Legard v. Sheffield*, 2 Atk. 377.

⁸ *Knickerbacker v. De Freest*, 2 Paige (N. Y.), 304.

⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 204.

¹⁰ *Russell v. Sharpe*, 1 Jac. & W. 482.

¹¹ *Ferguson v. Dent*, 15 Fed. R. 771, 772.

¹² *Ferguson v. Dent*, 15 Fed. R. 771, 772.

¹³ *Ferguson v. Dent*, 15 Fed. R. 771.

¹⁴ *Ferguson v. Dent*, 15 Fed. R. 771, 772.

¹⁵ *Braithwaite's Pr.* 322.

§ 40. ¹ Rule 87; *Harrison v. Rowan*, 4 Wash. C. C. 202, 207.

dian *ad litem* of the person in his charge,² unless his interest be opposed to that of the idiot or lunatic,³ or perhaps if he refuse to answer or defend.⁴ The guardian *ad litem* is usually joined with the idiot or lunatic as a co-defendant.⁵ It was held by Chancellor Kent, that in New York the committee appointed in accordance with statute, and not the idiot or lunatic, is the proper party to the bill;⁶ but the rule in the Federal courts seems to be otherwise.⁷ "A person reduced by age or infirmity to a second infancy may defend by guardian."⁸ It is said that the answer of a superannuated person, put in by guardian, may be read against him as an answer of one of full age put in in person; and that the difference in this respect between such answer and that of an infant put in by guardian is, because an infant improves and mends, and therefore is to have a day to show cause after he comes of age; but the other grows worse, and is to have no day.⁹

§ 41. **Suits against Married Women.**—In suits against a married woman by a third person, her husband, if not civilly dead or permanently absent from the State, should be joined with her as a co-defendant;¹ except perhaps in States where she has the same rights and liabilities as a spinster,² or when she is sued in a representative capacity.³ She, however, may answer separately from her husband.⁴ A bill filed in the name of a married woman suing alone, may be amended by the addition of a next friend, when necessary.⁵

² Story's Eq. Pl. § 70; Westcomb v. Westcomb, 1 Dickens, 233; Harrison v. Rowan, 4 Wash. C. C. 202, 207.

³ Snell v. Hyat, 1 Dickens, 287; Story's Eq. Pl. § 70.

⁴ Lloyd v. —, 2 Dickens, 460.

⁵ Harrison v. Rowan, 4 Wash. C. C. 202.

⁶ Brasher's Executors v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 242.

⁷ Harrison v. Rowan, 4 Wash. C. C. 202, 207.

⁸ Markle v. Markle, 4 J. Ch. 168.

⁹ Daniell's Ch. Pr. (2d Am. ed.) 224, 225; citing Leving v. Caverly, Prec. Ch. 229.

§ 41. ¹ Story's Eq. Pl. § 71; Calvert on Parties, Book III. ch. xxx.; Hulme v. Tenant, 1 Brown, Ch. C. 16; Taylor v. Holmes, 14 Fed. R. 498, 514.

² Lorillard v. Standard Oil Co., 2 Fed. R. 902. But see Taylor v. Holmes, 14 Fed. R. 499, 514; Douglas v. Butler, 6 Fed. R. 228; United States v. Pratt Coal & Coke Co., 18 Fed. R. 708; O'Hara v. MacConnell, 93 U. S. 150.

³ Moore v. Meynell, 2 Vern. 614, note.

⁴ Duke of Chandos v. Talbot, 2 P. Wms. 372.

⁵ Douglas v. Butler, 6 Fed. R. 228.

CHAPTER III.

PARTIES.

§ 42. **General Rule as to Parties.** — In ordinary cases, all persons should be made parties to a suit in equity, who are directly interested in obtaining or resisting the relief prayed for in the bill or granted in the decree.¹ If interested in obtaining the relief prayed for, they should join as plaintiffs; unless some refuse to appear in that capacity, when the rest should make them defendants.² This rule has been also stated by the expressions that “all persons interested in the subject of the suit should be before the court”;³ and that “all persons who have in the object or objects of the suit an interest or interests apparent upon the record, are necessary parties.”⁴

“In determining who are proper parties to a suit, courts of equity are guided by two leading principles. One of them is a principle admitted in all courts of justice in this country, upon questions affecting liberty, or life, or property; namely, that no proceedings shall take place with respect to the rights of any one, except in his presence. Thus a decree of a court of equity binds no one who is not to be regarded, according to the rules of the court, either as a party, or else as one who claims under a party, to the suit. The second is a principle which in this country is peculiar to courts of equity; namely, that when a decision is made, it shall provide for all the rights which different persons have in the matters decided. For a court of equity in all cases delights to do complete justice, and not by halves;⁵ to put an end to litigation, and to give decrees of such a nature that the performance of them may be perfectly safe to all who obey them: *interest reipublicae ut sit finis litium*. In this respect, there is a

§ 42. ¹ Calvert on Parties, Book I. ch. i., and cases there cited.

² *Harding v. Handy*, 11 Wheat. 103; *Wisner v. Barnet*, 4 Wash. C. C. 631, 642; *Fallows v. Williamson*, 11 Ves. 313; Calvert on Parties, Book I. ch. viii.

³ Sir William Grant in *Wilkins v. Fry*, 1 Mer. 244, 262.

⁴ Calvert on Parties (2d ed.), p. 13, and cases there cited.

⁵ *Knight v. Knight*, 3 P. Wms. 333.

manifest distinction between the practice of a court of law and that of a court of equity. A court of law decides some one individual question which is brought before it; a court of equity not merely makes a decision to that extent, but also arranges all the rights which the decision immediately affects.”⁶ Thus when a person who is charged with the payment of a sum of money is surety to another, the principal must be joined as defendant to the bill; as in the case of a suit against an heir for the performance of a covenant by his ancestor which binds him as well as the ancestor’s personal estate, when the personal representative must also be joined. For “the court of equity in all cases delights to do complete justice, and not by halves: as, first, to decree the heir to perform this covenant, and then to put the heir upon another bill against the executor to reimburse himself out of the personal assets, which, for aught appears to the contrary, may be more than sufficient to answer the covenant; and when the executor and heir are both brought before the court, complete justice may be done by decreeing the executor to perform this covenant as far as the personal assets will extend, the rest to be made good by the heir out of the real assets. And here appears no difficulty or inconvenience in bringing the executor before the court. On the contrary, it would prevent a multiplicity of suits, which a court of equity ought to do.”⁷

§ 43. **Parties with no Interest in the Subject-Matter of the Suit.**—Although as a general rule no person can be made a party against whom if brought to a hearing the plaintiff can have no decree,¹ yet the English practice allowed strangers in certain cases to be made parties for the sake of discovery, and even in order to mulct them with costs. In a suit against a corporation, its officers, book-keeper, or members might be made parties for the sake of discovery concerning matters which had come to their knowledge while transacting the business of the corporation;² but not, it seems, to obtain discovery of such as they knew only through their participation in its formation.³ Of the

⁶ Calvert on Parties (2d ed.), pp. 2, 3.

⁷ Lord Chancellor Talbot in *Knight v. Knight*, 3 P. Wms. 331, 334.

§ 43. ¹ *Wych v. Meal*, 3 P. Wms. 310, 311, note; *Dan. Ch. Pr.* (2d Am. ed.) 342.

² *Wych v. Meal*, 3 P. Wms. 310; *Anon*, 1 Vern. 117; *Fenton v. Hughes*, 7 Ves. 289; *Glyn v. Soares*, 1 Y. & C. 644;

Many v. Beekman Iron Co., 9 Paige (N. Y.), 189. Calvert on Parties (2d ed.), pp. 92-94. But see *Boston W. H. Co. v. Star R. Co.*, 40 Fed. R. 167; *Cleveland Forge & Bolt Co. v. U. S. Rolling Stock Co.*, 41 Fed. R. 476.

³ *McComb v. Chicago, St. Louis, & New Orleans R. R. Co.*, 7 Fed. R. 426.

rule, Lord Eldon said: "The principle upon which the rule has been adopted is very singular; it originated with Lord Talbot,⁴ who reasoned thus upon it, that you cannot have a satisfactory answer from a corporation, therefore you make the secretary a party, and get from him the discovery you cannot be sure of having from them; and it is added, that the answer of the secretary may enable you to get better information."⁵ "The first of these principles," continues Lord Eldon, "is extremely questionable, if it were now to be considered for the first time; and as to the latter, it is very singular to make a person a defendant in order to enable yourself to deal better, and with more success, with those whom you have a right to put upon the record; but this practice has so universally prevailed without objection that it must be considered established."⁶ When an answer under oath is waived, it is improper to make the officers of a corporation parties to a suit against it, if no relief is asked against them; and a demurrer by them to such a bill making them parties defendant will be sustained.⁷ Agents to sell, auctioneers, arbitrators, and attorneys could formerly be made defendants for a similar purpose in suits against their principals concerning transactions with which they were connected.⁸ And in a few cases of fraud it has been held that persons implicated in the fraud might be made parties merely to make them liable for costs.⁹

§ 44. **Persons who on account of their Interest need not be made Parties to a Suit in Equity.** — No persons should be joined as parties to a suit in equity, either as co-plaintiffs or co-defendants, who are not directly interested in obtaining or resisting the relief prayed for in the bill,¹ or who claim the property in question under inconsistent titles.² Thus, prior incumbrancers should not be made parties to a bill for the foreclosure of a mortgage,³ unless it prays for a receiver,⁴ or seeks to obtain a sale of the entire

⁴ In *Wych v. Meal*, 3 P. Wms. 310.

⁵ *Fenton v. Hughes*, 7 Ves. 287.

⁶ *Fenton v. Hughes*, 7 Ves. 288, 289.

⁷ *Colonial & U. S. Mortg. Co. Ld. v. Hutchinson Mortg. Co.*, 44 Fed. R. 219. See *Boston W. H. Co. v. Star Rubber Co.*, 40 Fed. R. 167.

⁸ *Fenton v. Hughes*, 7 Ves. 288, 289; *Dummer v. Corporation of Chippenham*, 14 Ves. 252.

⁹ *Taylor v. Rochford*, 2 Ves. Sen. 281; *Smith v. Green*, 37 Fed. R. 424; *Calvert on Parties* (2d ed.), p. 96, and

cases cited. See *Ewin v. Oregon Ry. & Nav. Co.*, 27 Fed. R. 625.

§ 44. ¹ *Calvert on Parties* (2d ed.), 6; *Mare v. Malachy*, 1 M. & C. 559.

² *Calvert on Parties* (2d ed.), 105; *Marquis Cholmondeley v. Lord Clinton*, 2 Jac. & W. 138; *Saumarez v. Saumarez*, 4 M. & C. 331; *Dial v. Reynolds*, 96 U. S. 340.

³ *Hagan v. Walker*, 14 How. 29, 37; *Jerome v. McCarter*, 94 U. S. 734.

⁴ *Miltenberger v. Logansport Railway Co.*, 106 U. S. 286, 306.

mortgaged property free from all liens,⁵ or unless "there is substantial doubt respecting the amount of debts due prior lien creditors," in which case "there is obvious propriety in making them parties, that the amount of the charge remaining on the land after the sale may be determined, and that purchasers at the sale may be advised of what they are purchasing;"⁶ or unless there are other peculiar circumstances making it necessary. So, in suits for specific performance, it is a general rule that none but parties to the contract or their representatives are necessary parties,⁷ unless there are other persons with such an interest in the contract or the property agreed to be sold that their concurrence is necessary to the completion of the title, or their rights would be prejudiced were a decree made in their absence.⁸ Nor need the assignor of the whole interest in a thing in action be made a party to a suit by the assignee,⁹ except in the case of a suit by the equitable assignee of a patent,¹⁰ or copyright,¹¹ or the licensee¹²

⁵ *Hagan v. Walker*, 14 How. 29; *Jerome v. McCarter*, 94 U. S. 734, 735.

⁶ Mr. Justice Strong in *Jerome v. McCarter*, 94 U. S. 734, at pages 735, 736.

⁷ *Tasker v. Small*, 3 M. & C. 63, 68; *Calvert on Parties* (2d ed.), Book III. ch. xvii.

⁸ *Jones v. Lewis*, 1 Cox Eq. 199; *Evans v. Jackson*, 8 Sim. 217; *Calvert on Parties*, Book III. ch. xvii.

⁹ *Harris v. Johnston*, 3 Cranch, 311; *Boon v. Chiles*, 8 Pet. 532; *Robertson v. Carson*, 19 Wall. 94; s. c. *Chase's Dec.* 475; *Batesville Institute v. Kauffman*, 18 Wall. 151; *Fulham v. McCarthy*, 1 H. L. C. 703.

¹⁰ *Stimpson v. Rogers*, 4 Blatchf. 333; *North v. Kershaw*, 4 Blatchf. 70; *Patterson v. Stapler*, 7 Fed. R. 210; *Goodyear v. Allen*, 3 Fisher, 284.

¹¹ *Colburn v. Duncombe*, 9 Sim. 151; *Chappell v. Purday*, 4 Y. & C. 485; *Calvert on Parties* (2d ed.), 315.

¹² *Waterman v. Mackenzie*, 138 U. S. 252, 255-256, 260-261, *per* Mr. Justice Gray: "The patentee or his assigns may, by instrument in writing, assign, grant, and convey either, first, the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or, second, an undivided part or share of that exclusive right; or, third, the exclusive right un-

der the patent within and throughout a specified part of the United States. Rev. Stat. § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. Rev. Stat. § 4919; *Gayler v. Wilder*, 10 How. 477, 494, 495; *Moore v. Marsh*, 7 Wall. 515. In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer, and cannot sue himself. Any rights of the licensee must be enforced through or in the name of the owner of the patent, and perhaps, if necessary, to protect the rights of all parties, joining the licensee with him as a plaintiff. Rev. Stat. § 4921; *Littlefield v. Perry*, 21 Wall. 205, 223; *Paper Bag Cases*, 105 U. S. 766, 771; *Birdsell v. Shaliol*, 112 U. S. 485-487.

or mortgagor¹³ by a mortgage duly recorded at Washington, or an assignee under an assignment still executory,¹⁴ when the assignor, licensor, or mortgagee must be joined as either plaintiff

And see *Renard v. Levinstein*, 2 Hem. & Mil. 628. Whether a transfer of a particular right or interest under a patent in an assignment or a license does not depend upon the name by which it calls itself, but upon the legal effect of its provisions. For instance, a grant of an exclusive right to make, use, and vend two patented machines within a certain district is an assignment, and gives the grantee the right to sue in his own name for an infringement within the district, because the right, although limited to making, using, and vending two machines, excludes all other persons, even the patentee, from making, using, or vending like machines within the district. *Wilson v. Rousseau*, 4 How. 646, 686. On the other hand, the grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent-right within the district, and is therefore only a license. Such, for instance, is a grant of 'the full and exclusive right to make and vend' within a certain district, reserving to the grantor the right to make within the district to be sold outside of it. *Gayler v. Wilder*, above cited. So is a grant of 'the exclusive right to make and use,' but not to sell, patented machines within a certain district. *Mitchell v. Hawley*, 16 Wall. 544. So is an instrument granting 'the sole right and privilege of manufacturing and selling' patented articles, and not expressly authorizing their use, because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others. *Hayward v. Andrews*, 106 U. S. 672. See also *Oliver v. Rumford Chemical Works*, 109 U. S. 75. A patent right is incorporeal property, not susceptible of actual delivery or possession; and the recording

of a mortgage thereof in the Patent Office, in accordance with the act of Congress, is equivalent to a delivery of possession, and makes the title of the mortgagee complete towards all other persons, as well as against the mortgagor. The right conferred by letters-patent for an invention is limited to a term of years, and a large part of its value consists in the profits derived from royalties and license fees. In analogy to the rules governing mortgages of lands and of chattels, and with even stronger reason, the assignee of a patent by a mortgage duly recorded, whose security is constantly wasting by the lapse of time, must be held (unless otherwise provided in the mortgage) entitled to grant licenses, to receive license fees and royalties, and to have an account of profits or an award of damages against infringers. There can be no doubt that he is the 'party interested,' either as patentee, assignee, or grantee,' and as such entitled to maintain an action at law to recover damages for an infringement; and it cannot have been the intention of Congress that a suit in equity against an infringer to obtain an injunction and an account of profits, in which the court is authorized to award damages when necessary to fully compensate the plaintiff, and has the same power to treble the damages as in an action at law, should not be brought by the same person. *Rev. Stat. §§ 4919, 4921; Root v. Railway Co.*, 105 U. S. 189, 212. The necessary conclusion appears to us to be that Shipman, being the present owner of the whole title in the patent under a mortgage duly executed and recorded, was the person, and the only person, entitled to maintain such a bill as this, and that the plea, therefore, was rightly adjudged good. In the light of our legislation and decisions, no weight can be given to the case of *Van Gelder v. Sowerby Bridge Society*, 44 Ch. D. 374, in which, upon pleadings and facts similar to those now before

¹³ *Waterman v. Mackenzie*, 138 U. S. 252, 261; quoted *supra*, note 12.

¹⁴ *Land Co. of New Mexico v. Elkins*, 20 Fed. R. 545.

or defendant. Nor need a mortgagor who has sold his equity of redemption be made a party to a foreclosure suit,¹⁵ unless relief is asked against him.¹⁶ It has been held at circuit that a tax collector is not a proper party to a bill to set aside a conveyance made by him.¹⁷ And, as has been said before, no persons should be joined as plaintiffs,¹⁸ or defendants,¹⁹ who claim the property in question under inconsistent titles. For example, a mortgagee cannot maintain a bill against the mortgagor for a foreclosure, which at the same time seeks to enjoin a claimant adverse to both mortgagor and mortgagee from asserting his title to the mortgaged property.²⁰ An interest in the question of law involved is not sufficient to make a person a necessary or even a proper party,²¹ except when a bill of peace is filed. The equity rules, following the English orders in chancery, also provide that "in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable."²² This rule, however, only applies when the demand is both joint and several, not when it is merely joint;²³ and when one of two or more jointly and severally indebted is the principal debtor to whom the others are sureties, he must, it seems, always be joined in a bill filed by the creditor to enforce a security against either of the latter.²⁴ Concerning the chancery

us, the mortgagor of a patent was treated as a mortgagor in possession, and was allowed to maintain a suit for infringement under the provisions of the English Judicature Act of 1873 and Patent Act of 1883. Stats. 36 & 37 Vict. ch. 66, § 25; 46 & 47 Vict. ch. 57, §§ 23, 46, 87. Whether in a suit brought by the mortgagee the court, at the suggestion of the mortgagor, or of the mortgagee, or of the defendants, might, in its discretion, and for the purpose of preventing multiplicity of suits or miscarriage of justice, permit or order the mortgagor to be joined, either as a plaintiff or as a defendant, need not be considered, because no such question is presented by this record.²⁵

¹⁵ *Kanawha Coal Co. v. Kanawha & Ohio Canal Co.*, 7 Blatchf. C. C. 391, 416.

But see *Matcain v. Smith*, 6 McLean, 416.

¹⁶ *Ayres v. Wiswall*, 112 U. S. 187.

¹⁷ *West v. Duncan*, 42 Fed. R. 430.

¹⁸ *Marquis Cholmondeley v. Lord Clinton*, 2 Jac. & W. 1, at page 135; *Saumarez v. Saumarez*, 4 M. & C. 331, 336. See *Parsons v. Lyman*, 4 Blatchf. C. C. 432.

¹⁹ *Dial v. Reynolds*, 96 U. S. 340.

²⁰ *Dial v. Reynolds*, 96 U. S. 340. But see *Hefner v. Northwestern Life Ins. Co.*, 123 U. S. 747.

²¹ *Vallette v. Whitewater Valley Canal Co.*, 4 McLean, 192.

²² Rule 51, copied from the 32d Order in Chancery of August, 1841.

²³ *Pierson v. Robinson*, 3 Swanst. 139 n.

²⁴ *Robertson v. Carson*, 19 Wall. 94; *Wilson v. City Bank*, 3 Sumner, 423;

order from which Rule fifty-one was copied, Vice-Chancellor Shadwell said that it "applied to cases where *several* persons were *liable* in different characters, — that is, some as principals and the rest as sureties; and then it was sufficient to make one individual of each class a party; but where there was only one principal and one surety, both of them must be made parties."²⁵

§ 45. **Cases where the Law has furnished a Representative.** — On account of the inconvenience which would be caused if the general rule were enforced in all cases, there are several classes of exceptions to it.¹ The first of these exists when the law has furnished a representative of the interest in question. In such a case, those whom he represents are not usually necessary parties to the suit.² Thus, executors and administrators are deemed sufficiently to represent all legatees, creditors, and next of kin in suits brought by or against them in their representative capacity,³ except when they are made defendants to a suit by a residuary legatee for his share of the estate,⁴ or are sued for collusion with a legatee who should then be made a party,⁵ or probably when an executor or administrator is charged with a breach of trust. So a bankrupt or insolvent debtor⁶ and his creditors⁷ are not usually necessary parties to a suit brought by or against his assignee. And by analogy to this, it has been held improper for a creditor of an estate to join with its receiver in a suit concerning it.⁸ Nor need one or more surviving parties in suits by or against strangers affecting the partnership property have joined with them the personal representatives of their deceased associate.⁹ So the English rule was that "a court of equity in many cases considers the tenant in tail as having the whole estate vested in him at least for the purposes of suit; and for these

Allan v. Houlden, 6 Beav. 148; Pinkus v. Peters, 5 Beav. 253.

² Lloyd v. Smith, 13 Sim. 457, at pages 458, 459.

§ 45. ¹ Wallworth v. Holt, 4 M. & C. 419; Powell v. Wright, 7 Beav. 449.

³ Calvert on Parties (2d ed.), 22. See Hopkirk v. Page, 2 Brock. 20, 42.

⁴ Brown v. Dowlthwaite, 1 Madd. 448; Potter v. Gardner, 12 Wheat. 499; Burton v. Smith, 4 Wash. C. C. 522; Dandridge v. Washington's Executors, 2 Pet. 370, 377; Wainwright v. Waterman, 1 Ves. Jr. 313; Anon., 12 Mod. 522.

⁴ Atwood v. Hawkins, Rep. temp. Finch, 113; Faithful v. Hunt, 3 Anst. 751; Calvert on Parties (2d ed.), 206, 208.

⁵ Attorney-General v. Wynne, Mos. 126.

⁶ De Wolf v. Johnson, 10 Wheat. 367, at p. 384; Van Reimsdyk v. Kane, 1 Gall. 371; Calvert on Parties (2d ed.), 24.

⁷ Spragg v. Binkes, 5 Ves. 587.

⁸ Doggett v. Railroad Co., 99 U. S. 72.

⁹ Pagan v. Sparks, 2 Wash. C. C. 325.

purposes does not look beyond the estate tail in a suit aiming by the decree to bind the right to the land.”¹⁰ “Those in remainder were considered as cyphers.”¹¹ “It appears that this rule was originally founded upon analogy to common law. As a tenant in tail might bar subsequent remainder-men,—in fact, might at any moment make himself master of the entire estate, it was considered by the court that he might be assumed to offer a satisfactory defense for all those subsequent interests. The court has, however, gone one step farther, and has treated infants as sufficient representatives of the inheritance, although they are unable, by reason of infancy, to bar remainder-men. In truth the court has gone to the full extent which is requisite for convenience in practice.”¹² It has been held that a tenant for life and the contingent remainder-man in fee may represent the inheritance in a bill for specific performance, if the children of the remainder-man will inherit if he does not.¹³

In most cases respecting trust property, it was said by Lord Eldon that the beneficiaries of the trust were necessary parties.¹⁴ The expression naturally suggests the inquiry, in what cases are they not to be made parties? There are some cases in which the existence or enjoyment of the property is affected by the prayer of the suit. There are others in which the existence of the property is not affected, and the only object is to transfer it into the hands of the trustees.¹⁵ In the latter cases the beneficiaries of the trust need not,¹⁶ although it seems they may be made parties.¹⁷ In the former, when not too numerous, their presence was always required¹⁸ before the equity rules. The rules, however, following an English chancery order,¹⁹ provide that: “In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the

¹⁰ Lord Eldon in *Lloyd v. Johnes*, 9 Ves. 65.

¹¹ Lord Camden in *Reynoldson v. Perkins*, Ambler, 564.

¹² *Calvert on Parties* (2d ed.), 56.

¹³ *Sohier v. Williams*, 1 Curt. 479.

¹⁴ *Adams v. St. Leger*, 1 B. & B. 182.

¹⁵ *Calvert on Parties* (2d ed.), 277.

¹⁶ *Franco v. Franco*, 3 Ves. 76; *Carey*

v. Brown, 92 U. S. 171; *Calvert on Parties* (2d ed.), 277, 278.

¹⁷ *Harrison v. Rowan*, 4 Wash. C. C. 202.

¹⁸ *Whistler v. Webb*, Bunb. 53; *Greene v. Sisson*, 2 Curt. 171; *Oliver v. Piatt*, 3 How. 333; s. c. 2 McLean, 268; *Cross v. DeValle*, 1 Wall. 5.

¹⁹ 30th Order of August, 1841.

same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit. But the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties."²⁰ "It seems doubtful, however," says Daniell, of the English order, "whether this order will apply to cases where a mortgagee seeks to foreclose the equity of redemption of estates which are subject to such trusts."²¹ Trustees under a railroad mortgage,²² or of any other trust-deed of a similar nature securing the rights in real property of a large number of beneficiaries,²³ are held, in all proceedings affecting the property which they thus hold, adequately to represent the latter, who will be bound in the absence of fraud by notice given, or a decree entered against them, although the court may in its discretion make any of such beneficiaries a party to the suit at his application.²⁴ It has been held, however, that to a bill against the heirs of a trustee to quiet the title to property conveyed by the trustee to the complainant, the beneficiary of the trust need not be joined as a party.²⁵ It has been held that a corporation is so far a representative of its stockholders that none of them need be joined in a suit for an accounting, under a lease which provides for the payment of dividends directly to its stockholders.²⁶ It has been held that a State statute authorizing one or more officers of an unincorporated association to represent the others in the courts, when suing or being sued about a matter concerning their common interest, will be followed by a Federal court of equity, and the members conclusively presumed to have the same citizenship as such officers.²⁷

²⁰ Rule 49.

²¹ Daniell's Ch. Pr. (2d Am. ed.) 394. See also *Wilton v. Jones*, 2 Y. & C. 244; *Cross v. De Valle*, 1 Wall. 1.

²² *Shaw v. Railroad Co.*, 100 U. S. 605, 611; *Beals v. Illinois, Mo. & T. R. R. Co.*, 133 U. S. 290; *Elwell v. Fosdick*, 134 U. S. 500; *Leavenworth County Com'rs v. Chicago, R. I. & P. Ry. Co.*, 134 U. S. 688.

²³ *Van Vechten v. Terry*, 2 Johns. Ch. (N. Y.) 197; *Kerrison v. Stewart*, 93 U. S. 155.

²⁴ *Williams v. Morgan*, 111 U. S. 684. See *Thomas v. Brownville, F. K. & P. R. R. Co.*, 109 U. S. 522.

²⁵ *Gridley v. Wynant*, 23 How. 500.

²⁶ *Pacific R. R. of Mo. v. Atlantic & P. R. R. Co.*, 20 Fed. R. 277.

²⁷ *Fargo v. Louisville, N. A. & C. Ry. Co.*, 6 Fed. R. 787; *Whitman v. Hubbell*, 30 Fed. R. 81; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; and *supra*, § 19. But see *Chapman v. Barney*, 129 U. S. 677.

§ 46. **Suits by a Complainant on behalf of Himself and Others similarly situated.**—When a number of persons have a common interest in a thing which is the subject of litigation, and, in some instances, when a number of persons have a common interest in a question which is before the court for decision, one or more may sue or be sued in behalf of the rest. Judge Story divides the first of these divisions into two: “(1) When the question is one of a common and general interest, and one or more sue or defend for the benefit of the whole;” and “(2) when the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole.”¹ But there seems to be no reason for treating these two classes separately. When one or more thus file a bill on behalf of themselves and others similarly interested, they must state in the title of their bill that they so sue, and show that the others are numerous or unknown.² Any of the others of the class have the right to join with them in the suit at any time upon payment of his share of the costs,³ and counsel fees⁴ which have been then paid or incurred, provided they do not seek to act in hostility to the original complainants,⁵ in which case the court may in its discretion allow them to intervene.⁶ If their joinder as plaintiffs would oust the court of jurisdiction, they may be brought in as defendants.⁷ Such a bill may be filed even when a majority of those interested object to the suit.⁸ For “where a matter is necessarily injurious to the common right, the majority of the persons interested can neither excuse the wrong nor deprive all other parties of their remedy by suit.”⁹ To such a bill it is not necessary to make defendants all who object to its being filed, provided that enough are brought before the court to sufficiently represent their interest.¹⁰ It was

§ 46. ¹ Story's Eq. Pl. § 97.

² *Hoe v. Wilson*, 9 Wall. 501.

³ *Ogilvie v. Knox Ins. Co.*, 2 Black, 539; s. c. 22 How. 380; *Ex parte Jordan*, 94 U. S. 248; *Hallett v. Hallett*, 2 Paige (N. Y.), 15; *Leigh v. Thomas*, 2 Ves. Sen. 313; *Ransom v. Davis*, 18 How. 295; Story's Eq. Pl. § 99.

⁴ *Central Railroad v. Pettus*, 113 U. S. 116; *Trustees v. Greenough*, 105 U. S. 527.

⁵ *Forbes v. Memphis, El Paso, & Pacific R. R. Co.*, 2 Woods, 323.

⁶ *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 478.

⁷ *Brown v. Pacific Mail S. S. Co.*, 5 Blatchf. C. C. 525, 535. But see *Stewart v. Dunham*, 115 U. S. 61.

⁸ *Bromley v. Smith*, 1 Simons, 8; *Taylor v. Salmon*, 4 Myl. & Cr. 134; Story's Eq. Pl. § 114. But see *Jones v. Garcia del Rio*, 1 Turn. & Russ. 300.

⁹ *Bromley v. Smith*, 1 Simons, 8, 11.

¹⁰ *Clinch v. Financial Corporation*, L. R. 4 Ch. App. 117, at p. 122; Story's Eq. Pl. § 135 b.

originally held that no one could sue on behalf of others who claimed for himself an interest in the matter in controversy distinct from that of those whom he sought to represent; for example, a mortgagee was not allowed to sue in behalf of general creditors while enforcing his mortgage;¹¹ but recent authorities seem to have changed this doctrine.¹² All on whose behalf one sues must appear to have an interest in the relief prayed for by him.¹³ In such a suit, the bill may be dismissed at any time before decree by the consent of those who are joined as plaintiffs,¹⁴ but not afterwards, since by the decree a right becomes vested in the others.¹⁵ The court will nearly always allow a bill filed by an individual in his own right to be amended, so as to allow him to sue on behalf of himself and other members of a class.¹⁶

§ 47. **Illustration of Bills filed by Representatives.** — The ordinary cases of bills filed by one person of a class on behalf of others similarly situated are bills by stockholders of corporations;¹ by members of unincorporated associations;² by railroad bondholders,³ of whom one holding bonds secured by successive mortgages may, after the death of all the trustees, sue for a foreclosure on behalf of himself and the holders of each class of the bonds which he owns;⁴ and bills by creditors.⁵ In a case where a railroad mortgaged its property directly, without the intervention of a trustee, to fifteen bondholders, naming them, and the adequacy of the security was doubtful; it was held that one could not sue on behalf of the rest, but that all the bondholders must be joined as parties to the bill.⁶ Such bills may also be

¹¹ *Burney v. Morgan*, 1 Sim. & S. 358, 362; *Palmer v. Foote*, 7 Paige (N. Y.), 437; *White v. Hillaere*, 3 Y. & C. 597.

¹² *Galveston Railroad v. Cowdrey*, 11 Wall. 459; *Mason v. Bogg*, 2 Myl. & Cr. 443; *Story's Eq. Pl.* § 101, and cases there cited.

¹³ *Newton v. Earl of Egmont*, 4 Simons, 574, 585; *Jones v. Garcia del Rio*, 1 T. & R. 297.

¹⁴ *Handford v. Storie*, 2 Sim. & S. 196; *Hubbell v. Warren*, 8 Allen (Mass.), 173.

¹⁵ *Handford v. Storie*, 2 Sim. & S. 196; *York v. White*, 10 Jurist, 168; *Innes v. Lansing*, 7 Paige (N. Y.), 583.

¹⁶ *Johnson v. Compton*, 4 Simons, 47; *Lloyd v. Loaring*, 6 Ves. 773; *Daniell's Ch. Pr.* (5th Am. ed.) 236, note 6, and 245, and cases cited.

§ 47. ¹ *Bacon v. Robertson*, 18 How. 480; *Wallworth v. Holt*, 4 Myl. & Cr. 619; *Taylor v. Salmon*, 4 Myl. & Cr. 134; *Hichens v. Congreve*, 4 Russell, 562; *Gray v. Chaplin*, 2 Sim. & S. 267; *Crease v. Babcock*, 10 Met. (Mass.) 532.

² *Bainbridge v. Burton*, 2 Beav. 539.

³ *Trustees of The Wabash & Erie Canal Co. v. Beers*, 2 Black, 448; *Galveston Railroad v. Cowdrey*, 11 Wall. 459; *Central Railroad v. Pettus*, 113 U. S. 116.

⁴ *Galveston Railroad v. Cowdrey*, 11 Wall. 459, 478.

⁵ *Fink v. Patterson*, 21 Fed. R. 602.

⁶ *Railroad Company v. Orr*, 18 Wall. 471.

filed by one or more legatees,⁷ at least if not residuary legatees;⁸ by one of several next of kin;⁹ by one of several partners;¹⁰ by one of a class for the benefit of which a charity was founded;¹¹ and by one of the crew of a privateer seeking an account from a defendant who has collected their joint prize money.¹²

§ 48. **Suits against one or more of a Class.** — Similarly, when persons who are jointly liable are very numerous, some may be sued instead of all, provided that the manner in which they are sued and the fact that they are numerous are stated in the bill.¹ Ordinarily, the complainant selects such of the class as he chooses to represent the rest. In one case, the persons thus selected were a committee chosen by the rest of the class to act for them in the matters complained of.² It is proper, however, to name all of the class in the title to the bill, and then have the court select some of them to be served and to defend for the rest.³ This rule applies to members of a club⁴ or other unincorporated association,⁵ when sued for the collection of its debts; and to the stockholders of a corporation in a suit brought by a creditor after its dissolution to recover the amount of its capital stock which has been divided among them.⁶ The equity rule upon this subject is as follows: "When the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties."⁷

⁷ *Bennett v. Honeywood*, Ambler, 708; *Story's Eq. Pl.* § 104, and cases cited.

⁸ Upon this point there is a conflict of authority. Compare *Brown v. Ricketts*, 3 J. Ch. (N. Y.) 555; and *Davoue v. Fanning*, 4 J. Ch. (N. Y.) 199, with *Kettle v. Crary*, 1 Paige (N. Y.), 417, note. See also *Story's Eq. Pl.* § 89.

⁹ *Story's Eq. Pl.* § 105.

¹⁰ *Chancey v. May*, Prec. Ch. 592; *Small v. Attwood*, 1 Younge, 407.

¹¹ *Smith v. Swormstedt*, 16 How 288.

¹² *Good v. Blewitt*, 13 Ves. 397; *West v. Randall*, 2 Mason, 181, 194.

§ 48. ¹ *Story's Eq. Pl.* §§ 116, 117; *McArthur v. Scott*, 113 U. S. 340, 395.

² *Railroad Company v. Howard*, 7 Wall. 392.

³ *Ayres v. Carver*, 17 How. 591.

⁴ *Cullen v. Duke of Queensberry*, 1 Brown Ch. 101; *Cousins v. Smith*, 13 Ves. 544; *Story's Eq. Pl.* § 116.

⁵ *Mandeville v. Riggs*, 2 Pet. 482; *Railroad Company v. Howard*, 7 Wall. 392.

⁶ *Wood v. Dummer*, 3 Mason, 315.

⁷ Rule 48. *McArthur v. Scott*, 113 U. S. 340, 395.

§ 49. **Suits by or against one or more as Representatives of a Class claiming a Common Right.** — In some instances when a number of persons having a common interest in the decision of a question of fact or law, though they have no common interest in any property which is the subject of litigation, yet, as they are said to claim under a common right, one or more of them have been allowed to represent the rest as plaintiffs or defendants in a suit to determine the disputed question.¹ Ordinarily, the complainant selects such defendants as he considers proper and sufficient; but he may name all of the class in the title of his bill and ask the court to select a few to defend on behalf of the rest.² Instances where a suit of this kind has been allowed by one or more as plaintiffs in behalf of others similarly situated, have usually occurred when, though the plaintiff and those represented by him had no common interest in property, yet he sought a determination of a question affecting the enjoyment of estates which, though distinct, came to him and the rest from a common source. Thus, one or more tenants or parishioners may sue a lord of a manor or parson, to establish a right of common,³ or of turbary.⁴ A few defendants have been allowed to represent a large class, not only when all of that class had some priority of estate, but also in other cases. Thus, a parson was allowed to sue a few on behalf of all his parishioners to establish a disputed right to tithes.⁵ A lord of a manor may sue some on behalf of all of his tenants to establish their duty to grind at his mill, or his right of enclosure,⁶ or to enforce a rent-charge.⁷ A bill was sustained when brought by those interested in contesting the legality of the issue of certain certificates of indebtedness, against some on behalf of all of the holders of such certificates.⁸ It seems that a bill can be sustained when filed by one claiming the prior equitable title to a tract of land, against some on behalf of all who have severally bought parcels of it since his right accrued, with notice thereof, praying that their conveyances may

§ 49. ¹ *West v. Randall*, 2 Mason, 181, 135.

² *Ayres v. Carver*, 17 How. 591.

³ *Anon.*, 1 Chancery Cases, 269; *Conyers v. Lord Abergavenny*, 1 Atk. 285; *Brown v. Vermuden*, 1 Ch. Cas. 272; *Smith v. Earl Brownlow*, L. R. 9 Eq. 244.

⁴ *Baker v. Rogers*, Sel. Ch. Cas. 74.

⁵ *Brown v. Vermuden*, 1 Ch. Cas. 272; *Hardeastle v. Smithson*, 3 Atk. 246.

⁶ *Brown v. Vermuden*, 1 Ch. Cas. 272.

⁷ *Attorney-General v. Wyburgh*, 1 P. Wms. 599; s. c. 2 Eq. Cas. Abr. 167; *Attorney-General v. Jackson*, 11 Ves. 365, 367; *Attorney-General v. Shelly*, 1 Salk. 162.

⁸ *Sheffield Water Works v. Yeomans*, L.R. 2 Ch. App. 8.

be set aside as in fraud of his rights.⁹ “And it has long been settled, that if a person has a common right against a great many of the king’s subjects, inasmuch as he cannot contend with all the king’s subjects, a court of equity will permit him to file a bill against some of them, taking care to bring so many persons before the court that their interests shall be such as to lead to a fair and honest support of the public interest; and when a decree has been obtained, then, with respect to the individuals whose interest is so fully and honestly established, the court on the footing of the former decree will carry the benefit of it into execution against other individuals who were not parties.”¹⁰ Thus, a city may file such a bill to establish its right to levy a duty.¹¹ In these cases, as has been said, a decree against the defendants before the court has been held in England to bind others of the same class;¹² but, on account of the positive language of the equity rule previously quoted, it is doubtful whether these decisions would be followed here.¹³

§ 50. **Omission of Defendants not within the Jurisdiction of the Court.** — The second exception to the general rule is, that persons who cannot be subjected to the jurisdiction of a court of equity need not be joined as parties to a bill, provided that their presence is not indispensable to a decree. “When any are absent from the jurisdiction who, if within it, would be necessary parties defendant, their presence will ordinarily be dispensed with, provided an equitable and effectual decree can be made against those who have been served with process. The former English practice was to charge in the bill the fact of the absence from the realm of any who otherwise ought to have been joined as defendants, and to pray that they might be served with process if they came within the jurisdiction. Under the modern English system this strictness is not required, and it seems to be sufficient if the excuse for not making the absent parties defendant appears on the face of the bill.”¹ This rule of equity practice has been affirmed by statute in the United

⁹ *Ayres v. Carver*, 17 How. 591.

¹² *Brown v. Vermuden*, 1 Ch. Cas. 272;

¹¹ Lord Eldon in *Weale v. West Middlesex Water Works Co.*, 1 Jac. & Walk. 358, 369.

Lord Eldon in *Weale v. West Middlesex Water Works Co.*, 1 Jac. & Walk. 358, 369.

¹³ *City of London v. Perkins*, 3 Bro. Parl. Cas. 602; *Mayor of York v. Pilkington*, 1 Atk. 282.

¹ See *McArthur v. Scott*, 113 U. S. 340, 395.

§ 50. ¹ Judge Foster in *Palmer v. Stevens*, 100 Mass. 461, pp. 465, 466.

States. "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it, but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of, nor found within the district as aforesaid, shall not constitute matter of abatement or objection to the suit."² This statute is, however, merely declaratory, and does not enlarge the power previously possessed by courts of equity.³ The power has been extended by rule, and parties not indispensable to an equitable decree may be omitted if their joinder would oust the court of jurisdiction by placing persons of the same citizenship upon different sides of a controversy. "In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the absent parties."⁴ "If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction."⁵ Such being the general rule, it remains to be considered what parties are indispensable to an equitable decree. As has been said above, a court of equity will ordinarily seek to have before it as parties all persons in any manner interested in

² U. S. R. S. § 737. See *Conolly v. Wells*, 33 Fed. R. 205; *Wall v. Thomas*, 41 Fed. R. 620.

³ *Shields v. Barrow*, 17 How. 130, 141.

⁴ Rule 47.

⁵ Rule 22.

the subject-matter of the litigation, in order that it may make a decree which will prevent the necessity of a subsequent appeal to its aid.⁶ This rule, however, having been established for the promotion of justice, will be modified whenever its rigid enforcement would prevent the court from doing justice to a person invoking its aid. Accordingly it will proceed to a decree without the presence of such parties as cannot be subjected to its jurisdiction, provided it can determine the respective rights of the parties before it without affecting those of the rest. There are three classes of parties: Formal parties; parties necessary to a decree which completely disposes of the controversy, so that the aid of the court need not be invoked again, but whose interests are so far separable from those of the parties before the court, that it can dispose of the controversy between the latter without affecting the interests of the former; and parties with an interest in the controversy "of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."⁷ Of these the first two classes can always be omitted, when they are beyond the reach of the process of the court or their joinder would oust its jurisdiction. The rule upon the subject has been well stated by Mr. Justice Bradley. "The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation. But there are qualifications of this rule arising out of public policy and the necessities of particular cases. The true distinction appears to be as follows: First, when a person will be directly affected by a decree he is an indispensable party, unless the parties are too numerous to be brought before the court, when the case is subject to a special rule. Secondly, when a person is interested in the controversy, but will not be directly affected by a decree made in his absence, he is not an indispensable party, but he should be made a party if possible, and the court will not proceed to a decree without him if he can be reached. Thirdly, when he is not interested in the controversy between the immediate litigants, but has an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent

⁶ § 42.

⁷ Mr. Justice Curtis in *Shields v. Barrow*, 17 How. 130, 139.

further litigation, he may be a party or not at the option of the complainant."⁸

§ 51. **Formal Parties who may be omitted when without the Jurisdiction.** — Formal parties are those with a naked legal title but no equitable interest in the subject-matter of the controversy. If the persons really interested are before the court, formal parties can always be omitted if without the jurisdiction;¹ and their joinder, no matter whether as plaintiffs or defendants, cannot oust the court of jurisdiction, as they are in reality upon neither side of the controversy.² Such are, a husband against whom no relief is sought, in a suit by his wife to enforce the trusts of a marriage settlement;³ one or all of the trustees of a railroad or canal mortgage not opposing the foreclosure in a bondholder's foreclosure suit;⁴ trustees of prior railroad mortgages in a suit for the foreclosure of a subsequent mortgage and the sale of the mortgaged property subject to their liens;⁵ and parties with the naked legal title having no interest in the controversy.⁶ A person against whom an injunction is sought, unless he consents thereto, is never a nominal party.⁷

§ 52. **Parties whose Interest is Separable.** — The second class is not so easy to define; and it is difficult to mark the limits between this and the third class of parties who are always indispensable. It includes all having an interest in the controversy so far separable from that of those before the court that a decree can be made and enforced, which disposes of the matter in dispute between the latter without affecting their rights.¹ Thus,

⁸ *Williams v. Bankhead*, 19 Wall. 563, 571.

§ 51. ¹ *Simms v. Guthrie*, 9 Cranch, 19, 25; *Wormley v. Wormley*, 8 Wheat. 421, 451, *Boon's Heirs v. Chiles*, 8 Pet. 532; *Union Bank of Louisiana v. Stafford*, 12 How. 327; *New Orleans Canal & Banking Co. v. Stafford*, 12 How. 343.

² *Wormley v. Wormley*, 8 Wheat. 421, 451; *Removal Cases*, 100 U. S. 457; *Pacific R. R. v. Ketchum*, 101 U. S. 289; *Walden v. Skinner*, 101 U. S. 577; *Harter v. Kernochan*, 103 U. S. 562.

³ *Wormley v. Wormley*, 8 Wheat. 421; *Taylor v. Holmes*, 14 Fed. R. 499. But see *Watts v. Waddle*, 1 McLean, 200.

⁴ *Pacific R. R. v. Ketchum*, 101 U. S. 289, 299; *Stewart v. Chesapeake & Ohio*

Canal Co., 1 Fed. R. 361; *Walden v. Skinner*, 101 U. S. 577, 588.

⁵ *Pacific R. R. v. Ketchum*, 101 U. S. 289, 298.

⁶ *Simms v. Guthrie*, 9 Cranch, 19, 25; *Boon's Heirs v. Chiles*, 8 Pet. 532; *Union Bank of Louisiana v. Stafford*, 12 How. 327; *New Orleans Canal & Banking Co. v. Stafford*, 12 How. 343; *Walden v. Skinner*, 101 U. S. 577, 588; *Bacon v. Rives*, 106 U. S. 99.

⁷ *Ward v. Arredondo*, 1 Paine, 410; *Mills v. Hurd*, 32 Fed. R. 127.

§ 52. ¹ *Cameron v. McRoberts*, 3 Wheat. 591; *Mallow v. Hinde*, 12 Wheat. 193; *Gridley v. Wynant*, 23 How. 500; *Horn v. Lockhart*, 17 Wall. 570; *Nesmith v. Calvert*, 1 Woodb. & M. 34.

a trustee or director, beyond the jurisdiction, has been held properly omitted in a suit against his colleagues on account of a breach of trust.² For a trustee's liability is joint and several.³ One of the next of kin⁴ may sue an administrator and his sureties; and a legatee,⁵ at least if not a residuary legatee, may sue an executor to recover his share of a decedent's estate without joining the rest of the class to which he belongs. It seems, that the executor of a dead debtor need not be a party to a bill brought by a creditor of the estate to obtain payment out of assets in the hands of a legatee.⁶ Subsequent lienors are not indispensable parties to a foreclosure suit.⁷ In a suit against a firm by strangers, a partner beyond the jurisdiction may probably be omitted if no injustice will be done him by a decree in his absence.⁸ It has been held that in a suit by one partner against another for an account of money received by the defendant in excess of his share of the firm assets, partners beyond the jurisdiction may be omitted if it appears that each has received his full share of the joint property.⁹ When one of two joint contractors has fraudulently released his interest in the contract, he is not an indispensable party to a bill filed by his associate against the other party.¹⁰ "The owners of partial interests in contracts for land, acquired subsequently to their execution, are not necessary parties to bills for their enforcement. The original parties on one side are not to be mixed up in controversies between the parties on the other side, in which they have no concern."¹¹ An heir may file a bill for the specific performance of a contract entitling his ancestor to purchase land without bringing in the personal representative of his ancestor, provided that he offers him-

² *Parsons v. Howard*, 2 Woods, 1, 5; *Heath v. Erie Ry. Co.*, 8 Blatchf. C. C. 345; *Hazard v. Durant*, 19 Fed. R. 471, 476. But see *Wall v. Thomas*, 41 Fed. R. 620.

³ *Parsons v. Howard*, 2 Woods, 1, 5; *Heath v. Erie Ky. Co.*, 8 Blatch. 347.

⁴ *Payne v. Hook*, 7 Wall. 425. See, however, *West v. Randall*, 2 Mason, 181; *Wisner v. Barnet*, 4 Wash. C. C. 631, 642; *Greene v. Sisson*, 2 Curtis, 171.

⁵ *Dandridge v. Washington's Executors*, 2 Pet. 377. See *West v. Randall*, 2 Mason, 181.

⁶ *Milligan v. Milledge*, 3 Cranch, 220.

⁷ *Brewster v. Wakefield*, 22 How. 118,

129; *Union Bank of Louisiana v. Stafford*, 12 Howard, 327; *New Orleans Canal & Banking Co. v. Stafford*, 12 How. 343; *Howard v. Railway Co.*, 101 U. S. 837.

⁸ *Cowslad v. Cely*, Prec. Ch. 83; *Darwent v. Walton*, 2 Atk. 510, *Calvert on Parties*, Book III., ch. xxiii.; *Vose v. Philbrook*, 3 Story, C. C. 335. But *contra*, *Parsons v. Howard*, 2 Woods, 1, *Bell v. Donohoe*, 17 Fed. R. 710.

⁹ *Towle v. Pierce*, 12 Met. (Mass.) 329. ¹⁰ *Canal Co. v. Gordon*, 6 Wall. 561.

¹¹ Mr. Justice Field in *Willard v. Tayloe*, 8 Wall. 557, 571. But see *Hoxie v. Carr*, 1 Sumner, 173

self to provide for the payment of the purchase-money.¹² Specific performance of a contract for the sale of land may be enforced against one of several joint tenants without joining the others with him as defendants.¹³ The assignor of a claim is not a necessary party to a suit upon it by his assignee¹⁴ unless the assignment be executory.¹⁵ A railway company is not an indispensable party to a bill against its receiver to enforce specific performance of a contract made by it.¹⁶ The directors of a corporation are not indispensable parties to a suit by a stockholder to restrain it from acting in violation of his rights.¹⁷ To a bill to restrain the directors of a corporation from negotiating a fraudulent sale of its property, the person to whom the sale is about to be made is not an indispensable party if no contract has been made with him.¹⁸ To a suit by one indorser of a bill of exchange to restrain the collection of a judgment for the amount of the bill against him, upon the ground that the bill had been paid by another indorser, the latter indorser is not a necessary party.¹⁹ To a bill by a creditor to satisfy a judgment out of land in a debtor's possession, but fraudulently conveyed by him to a person beyond the jurisdiction of the court, the person in whose name the land stood has been held not to be an indispensable party.²⁰ To a bill to enjoin the execution of a judgment of ejectment and to decree a conveyance of lands, when the plaintiffs had an equitable title only, the persons whose legal title the complainants asserted were held properly omitted, when no relief was prayed against them, and their joinder would have ousted the court of jurisdiction.²¹ It has been said, that, to a bill by a private individual to enjoin the maintenance of a public nuisance, neither persons jointly interested with him nor those jointly guilty with the defendant are indispensable parties.²² It has been suggested that the absence of one person guilty of a joint fraud might not prevent the court

¹² *Prout v. Roby*, 15 Wall. 471.

¹³ *Stephen v. Beall*, 22 Wall. 329.

¹⁴ *Batesville Institute v. Kauffman*, 18 Wall. 151; *Trecothick v. Austin*, 4 Mason, 16.

¹⁵ *Land Co. of New Mexico v. Elkins*, 20 Fed. R. 545.

¹⁶ *Express Co. v. Railroad Co.*, 99 U. S. 191.

¹⁷ *Heath v. Erie Ry. Co.*, 8 Blatchf. C. C. 347.

¹⁸ *Abbot v. American Hard Rubber*

Co., 4 Blatchf. C. C. 489; *Wallace v. Holmes*, 9 Blatchf. C. C. 65.

¹⁹ *Atkins v. Dick*, 14 Pet. 114.

²⁰ *McCoy v. Rhodes*, 11 How. 131, 141.

²¹ *Simms v. Guthrie*, 9 Cranch, 19, 25.

See also *Boon's Heirs v. Chiles*, 8 Pet. 532. But compare *Mallow v. Hinde*, 12 Wheat. 193. A border case is *Elmendorf v. Taylor*, 10 Wheat. 152.

²² *Mississippi & Missouri R. R. Co. v. Ward*, 2 Blackf. 485.

from taking jurisdiction over the others.²³ In an action by a creditor of a corporation to enforce the individual liability of its directors or stockholders, or to collect unpaid assessments or subscriptions from them, he cannot usually sue alone at law, but should file a bill in equity in behalf of himself and the other creditors,²⁴ if any; and he may ordinarily make one, some, or all the stockholders parties according to his pleasure.²⁵ A State is not an indispensable party to a bill seeking to restrain its officers from levying for its benefit an illegal tax;²⁶ nor, it has been held, to a bill to prevent their illegal issue of land warrants for property which it had agreed to convey to the plaintiff;²⁷ nor to a bill to restrain their unlawful issue of bonds which would diminish the value of bonds held by the complainant.²⁸ To such bills the persons to whom the unlawful issue of bonds or land warrants is about to be made, are not indispensable parties.²⁹

§ 53. **Parties indispensable to a Decree.** — No suit, however, can proceed unless the court have before it as parties all persons who will be directly affected by the decree sought, or whose obedience is necessary to its enforcement, when it does not appear that they consent thereto.¹ A person is affected by a decree when his rights against, or liability to any of the parties to the suit is thereby determined. If a decree in favor of the complainant would cast a cloud upon another's title, that person, it seems, is thereby directly affected.² A State is an indispensable party to a bill against its officers to compel specific performance by them for it of its contract for the sale of land;³ or to establish a claim to property held by its officers claiming a title in the State thereto;⁴ or to incorporate stock registered in its name, the certi-

²³ Judge Foster in *Palmer v. Stevens*, 100 Mass. 461, 466. See also *Heath v. Erie Railway Co.*, 8 Blatchf. C. C. 347. But see *Bell v. Donohoe*, 17 Fed. R. 710; *Wall v. Thomas*, 41 Fed. R. 620.

²⁴ *Honor v. Henning*, 93 U. S. 228; *Terry v. Little*, 101 U. S. 216; *Terry v. Tubman*, 92 U. S. 156; *Pollard v. Bailey*, 20 Wall. 526; *Welles v. Graves*, 41 Fed. R. 459.

²⁵ *Ogilvie v. Knox Ins. Co.*, 22 How. 380; *Hatch v. Dana*, 101 U. S. 205; *Manufacturing Company v. Bradley*, 105 U. S. 175.

²⁶ *Osborn v. Bank of the United States*,

9 Wheat. 738; *Dodge v. Woolsey*, 18 How. 331.

²⁷ *Davis v. Gray*, 16 Wall. 203; *Hancock v. Walsh*, 3 Woods, 351. But see *Cunningham v. Macon & Brunswick R. Co.*, 109 U. S. 446, 453.

²⁸ *Board of Liquidation v. McComb*, 92 U. S. 531.

²⁹ *Davis v. Gray*, 16 Wall. 203, 233.

§ 53. ¹ See § 55. But see *Eagle Manuf. Co. v. Miller*, 41 Fed. R. 351.

² *Young v. Cushing*, 4 Biss. 456.

³ *Preston v. Walsh*, 10 Fed. R. 315. See also *Walsh v. Preston*, 109 U. S. 297.

⁴ *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446.

ficates of which are held by its officers;⁵ or to enjoin its officers from commencing a suit in its name;⁶ but not, it has been held, to a bill by the United States against a private individual to cancel a contract between him and the State for the purchase of land obtained by the State from the plaintiff through mistake or fraud.⁷ The trustee of an active trust is a necessary party to a suit affecting the trust estate.⁸ Every party to a contract, whether of sale or for another purpose, except a party who has released his interest,⁹ is ordinarily a necessary party to a suit to enforce it;¹⁰ or to set it aside;¹¹ or, unless its performance would amount to a nuisance,¹² to enjoin a person from carrying it into effect,¹³ even it has been held in a case at circuit when the other parties are co-trustees beyond the jurisdiction of the court.¹⁴ Thus, a railway company is an indispensable party to a suit to enjoin another railway company from constructing a road under a lease by it.¹⁵ To a bill against the administrator with the will annexed of Kosciuszko, claiming a legacy under an alleged codicil to the will, foreigners claiming the assets of the deceased as heirs-at-law were held necessary parties.¹⁶ To a bill between partners for an accounting, all the surviving partners and the representatives of a deceased partner, even when alleged to be insolvent, are, it seems, indispensable parties,¹⁷ unless it can be shown that each of those omitted has received his full share of the assets, and that no claim is made against him.¹⁸ To a par-

⁵ *Christian v. Atlantic & N. C. R. R. Co.*, 133 U. S. 233.

⁶ *In re Ayers*, 123 U. S. 443.

⁷ *Williams v. United States*, 138 U. S. 514, 516.

⁸ *McRea v. Branch Bank of Alabama*, 19 How. 376; *O'Hara v. MacConnell*, 93 U. S. 150; *Thayer v. Life Association*, 112 U. S. 717; *American Bible Society v. Price*, 110 U. S. 61.

⁹ *Canal Company v. Gordon*, 6 Wall. 561.

¹⁰ *Mallow v. Hinde*, 12 Wheat. 193; *Shields v. Barrow*, 17 How. 130; *Gregory v. Stetson*, 133 U. S. 579.

¹¹ *Shields v. Barrow*, 17 How. 130; *Coiron v. Millaudon*, 19 How. 113; *Gaylords v. Kelshaw*, 1 Wall. 81; *Ribon v. Railroad Companies*, 16 Wall. 446; *Lawrence v. Wirtz*, 1 Wash. C. C. 417; *Tobin v. Walkinshaw*, 1 McAll. 26; *Bel v. Donohoe*, 17 Fed. R. 710; *Florence Sew-*

ing Machine Company v. Singer Manuf. Company, 4 Fisher's Pat. Cas. 329; s. c. 8 Blatchf. C. C. 113; *Chadbourn v. Coe*, 45 Fed. R. 822. But see *French v. Shoemaker*, 14 Wall. 314; *West v. Duncan*, 42 Fed. R. 430.

¹² *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black, 485.

¹³ *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.*, 15 How. 233. But see *Heriot v. Davis*, 2 Woodb. & M. 229; *Boon's Heirs v. Chiles*, 8 Pet. 532.

¹⁴ *Wall v. Thomas*, 41 Fed. R. 620.

¹⁵ *Northern Indiana R. R. Co. v. Michigan Central R. R. Co.*, 15 How. 233.

¹⁶ *Armstrong v. Lear*, 8 Pet. 52.

¹⁷ *Bank v. Carrollton R. R.*, 11 Wall. 624; *Bartle v. Coleman*, 3 Cranch, C. C. 283; *Gray v. Larrimore*, 2 Abb. C. C. 542.

¹⁸ *Towle v. Pierce*, 12 Met. (Mass.) 329.

tition suit all of the tenants in common are indispensable parties.¹⁹ A person in possession under a claim of a title or interest in property is a necessary party to a suit affecting it.²⁰ The mortgagor is a necessary party to a suit by the mortgagee against a third person to remove a cloud upon the title.²¹ It is the safer practice to join the mortgagor as a party defendant to a bill by the mortgagee of a patent seeking an injunction against its infringement with damages or an account of profits.²² The mortgagor is not an indispensable, although he is a proper party, to a bill to collect a mortgage from a purchaser who has assumed it; when before the bill is filed the mortgaged property was sold upon the foreclosure of a prior mortgage.²³ To a bill to enforce specific performance of a contract, providing for the sale of land the title to which was in one party, and its distribution between both parties to the contract, when filed, after the death of each, by the personal representatives of the one as complainants, against the heirs-at-law of the other as defendants, the executors of the defendant's ancestor are necessary if not indispensable parties defendant, and the heirs-at-law of the complainants' decedent are not.²⁴ All a man's heirs-at-law are indispensable parties to a bill by one of them to set aside a sale of his property under a decree; and to such a bill the party to the former suit at whose instance the sale was made is also an indispensable party.²⁵ All a woman's heirs have been held necessary parties to a bill to set aside a marriage settlement.²⁶ To a bill by a stockholder to set aside the foreclosure of a railroad mortgage, the trustees of the mortgage foreclosed, the mortgagor, the purchaser, and enough of the stockholders and bondholders as consented to the foreclosure to represent the remainder, are indispensable parties.²⁷ A corporation or its receiver²⁸ must be a party to a suit to enforce a right against a third person which the corporation refuses to assert.²⁹ The trustees and county treasurer of an Iowa township

¹⁹ *Barney v. Baltimore City*, 6 Wall. 280.

²⁰ *Williams v. Bankhead*, 19 Wall. 563; *Young v. Cushing*, 4 Biss. 456. But see *Ringo v. Binns*, 10 Pet. 269, 281.

²¹ *Bettes v. Dana*, 2 Sumner, 383.

²² *Waterman v. Mackenzie*, 138 U. S. 252, 261; quoted *supra*, § 44, note 12.

²³ *Kelly v. Ashford*, 133 U. S. 610, 626.

²⁴ *Seymour v. Freer*, 8 Wall. 202, 218. See *Prout v. Roby*, 15 Wall. 471.

²⁵ *Hoe v. Wilson*, 9 Wall. 501; *Harwood v. Railroad Co.*, 17 Wall. 78.

²⁶ *McDonnell v. Eaton*, 18 Fed. R. 710.

²⁷ *Ribon v. Railroad Companies*, 16 Wall. 446.

²⁸ *Porter v. Sabin*, 36 Fed. R. 475.

²⁹ *Davenport v. Dows*, 18 Wall. 626; *New Jersey Central R. R. Co. v. Mills*,

are necessary parties to a suit by a taxpayer to prevent the payment to their holder of bonds claimed to be invalid.³⁰ It seems, that the principal debtor, or his assignee in bankruptcy or insolvency, is a necessary party to a suit against a surety.³¹ To a suit by a creditor to enforce a lien upon property through a trust-deed made for the benefit of a surety, both the trustee and his beneficiary are indispensable parties, although the property is in the possession of neither of them; but if filed in a double aspect, either for the complainant's individual benefit, or on behalf of the other creditors of the principal debtor, a sale may be ordered without having the surety or his trustee before the court.³² So, a debtor, or if a bankrupt or insolvent, his assignee, is a necessary party to a creditor's suit to enforce a lien³³ or levy³⁴ upon property in which the debtor has an interest, or to collect³⁵ a debt due the debtor. A corporation must be joined as a defendant to a bill filed by a creditor to apply to the payment of its indebtedness money due it from its stockholders;³⁶ and to a bill to compel a transfer upon its books of stock which stands in the name of another than the complainant.³⁷ To a bill by a legatee against the husband of a residuary legatee or devisee to obtain payment of the complainant's legacy from assets in the defendant's possession, the residuary legatee herself, or, if she be dead, her personal representative, is a necessary party,³⁸ at least when it does not appear that she or her personal representative is without the jurisdiction of the court. To a bill to foreclose a mortgage by an executor, it was held that all devisees of any part of the property were indispensable parties.³⁹

It was held in a case, the authority of which may be doubted, that in a suit to compel the execution of a mortgage and its fore-

113 U. S. 249, 256; *Bell v. Donohoe*, 17 Fed. R. 710.

³⁰ *Sully v. Drennan*, 113 U. S. 287. Compare *Harter v. Kernochan*, 103 U. S. 562.

³¹ *Robertson v. Carson*, 19 Wall. 94. See also *Russell v. Clark*, 7 Cranch, 69. But compare Rule 51.

³² *McRae v. Branch Bank of Alabama*, 19 How. 376.

³³ *Russell v. Clark*, 7 Cranch, 69; *Robertson v. Carson*, 19 Wall. 94. But see *Heriot v. Davis*, 2 Woodb. & M. 229.

³⁴ *Wilson v. City Bank*, 3 Sumner, 422.

³⁵ *United States v. Howland*, 4 Wheat. 108.

³⁶ *Brigham v. Luddington*, 12 Blatchf. C. C. 237; *First National Bank v. Smith*, 6 Fed. R. 215; *Dormitzer v. Illinois & St. L. Bridge Co.*, 6 Fed. R. 217; *Walsh v. Memphis, C. & N. W. R. R. Co.*, 6 Fed. R. 797.

³⁷ *Kendig v. Dean*, 97 U. S. 423; *Rogers v. Nortwick*, 45 Fed. R. 513. But see *Gould v. Head*, 41 Fed. R. 240, 248.

³⁸ *Lewis v. Darling*, 16 How. 1.

³⁹ *Detweiler v. Holderbaum*, 42 Fed. R. 337. See § 22.

closure, prior incumbrancers and others claiming an interest in the mortgaged property were necessary parties, when it did not appear that their joinder was impossible or would oust the jurisdiction.⁴⁰ In one case, where a bill was filed to stay proceedings in ejectment, the court required the nominal defendant at law to be joined as a co-plaintiff with the real person interested; although it did not appear what citizenship he had.⁴¹

§ 54. **When Numerous Interests have been created for the Purpose of preventing the Plaintiff from obtaining Equitable Relief.** — When numerous interests have been created for the purpose of preventing a person from obtaining equitable relief, the English courts allowed the persons to whom these interests were thus conveyed to be omitted from the bill, if the original owner of the property thus divided were made a defendant.¹ The rule and the reasons for it are thus stated by Calvert in his valuable work on Parties: "If a party has divided an interest amongst a number of persons for this purpose, the court, in order that the contrivance may be frustrated, and the equitable relief may be obtained, allows the suit to proceed in their absence. Such a division is in reality a fraud; an attempt to defeat justice by converting the general rule of the court into an obstruction to the ordinary proceedings. The court defeats the fraud by refusing to enforcing the general rule."² Lord Hardwicke said upon this subject: "Where a mortgagee who has a plain redeemable interest makes several conveyances upon trust, in order to entangle the affair, and to render it difficult for a mortgagor or his representatives to redeem, there it is not necessary that the plaintiff should trace out all the persons who have an interest in such trust, to make them parties."³ This rule might, perhaps, be extended here to a case, where an attempt had been made to defeat the jurisdiction of the Federal court by a merely colorable conveyance to a person of the same citizenship as the complainant.⁴

§ 55. **When a Person consents to the Relief Sought.** — A person who consents to the relief sought, when it is so stated in the bill.

⁴⁰ *Caldwell v. Taggart*, 4 Pet. 190.

⁴¹ *Hyde v. Folger*, 4 McClean, 255.

² Calvert on Parties (2d ed.), 61.

³ *Yates v. Hambly*, 2 Atk. 237, 238.

⁴ See *Union Bank of Louisiana v. Stafford*, 12 How. 327; *New Orleans Canal & Banking Co. v. Stafford*, 12 How. 343; *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778, 781.

§ 54. ¹ Calvert on Parties (2d ed.), Book I. ch. iv., p. 61; *Yates v. Hambly*, 2 Atk. 237. See also *Union Bank of Louisiana v. Stafford*, 12 How. 327; *New Orleans Canal & Banking Co. v. Stafford*, 12 How. 343.

need not be joined as a defendant with the other parties interested, unless his presence is indispensable for their protection.¹ Sometimes the plaintiff is required to execute a satisfactory undertaking that the party omitted will conform to the decree.² Similarly, a person who disclaims all interest in the subject-matter may also be omitted, unless his joinder is essential to the protection of the rights of the other defendants.³ An agreement between two persons that one shall represent the other as plaintiff, when the former would otherwise have no right to the relief sought, will not be sanctioned by the court.⁴

§ 56. **When the Plaintiff waives his Right against a Person.** — “Where a plaintiff,” says Lord Hardwicke, “is only concerned in interest, there he may waive his demand, and omit making the party a defendant to his bill.”¹ In accordance with this practice, the equity rules provide that “in suits to execute the trusts of a will, it shall not be necessary to make the heir-at-law a party; but the plaintiff shall be at liberty to make the heir-at-law a party when he desires to have the will established against him.”² Such a waiver cannot, however, be made unless it can be without prejudice to those against whom the bill is filed.³

§ 57. **When the Interest of an absent Person is evidently very small.** — In England it has been held, in accordance with the maxim *de minimis non curat lex*, that when the interest of an absent person is evidently very small the court will dispense with his presence in the suit.¹ This view seems to be sanctioned by two decisions of the Supreme Court of the United States.²

§ 58. **When the Right of Administration is in Dispute.** — The English rule was, that when there was a contest in the Ecclesiastical Court over the right of administration upon a decedent's estate, the omission in a bill affecting that estate of an administrator

§ 55. ¹ *Mechanics' Bank of Alexandria v. Seton*, 1 Pet. 299, 306; *Calvert on Parties* (2d ed.), Book I. ch. v., pp. 69, 84.

² *Calvert on Parties* (2d ed.), Book I. ch. v., p. 69; *Kirk v. Clark*, Prec. in Ch. 275; *Harvey v. Cooke*, 4 Russ. 35, 55; *Bawtree v. Watson*, 3 M. & K. 334, 340.

³ *Vattier v. Hinde*, 7 Pet. 252, 258.

⁴ *Rylands v. Latouche*, 2 Bligh, 579.

§ 56. ¹ *Williams v. Williams*, 9 Mod. 229. See also *Wilson v. Told*, 1 M. & C. 42, 46; *Calvert on Parties* (2d ed.), 83, and cases cited.

² Rule 50, copied from the 31st Order in Chancery of August, 1841.

³ *Anon.*, 2 Eq. Cas. Abr. 166, pl. 6; *Story's Eq. Pl.* § 133.

§ 57. ¹ *Calvert on Parties* (2d ed.), Book I. ch. v., p. 70; *Daws v. Benn*, 1 J. & W. 513; *Attorney-General v. Goddard*, 1 T. & R. 348, 350. See also *Faulkner v. Daniel*, 3 Hare, 199, 213.

² *Union Bank of Louisiana v. Stafford*, 12 How. 327; *New Orleans Canal & Banking Co. v. Stafford*, 12 How. 343.

might be excused if special circumstances were shown.¹ If, however, no proceeding in the Ecclesiastical Court were pending, one must be instituted before the bill could be filed.²

§ 59. **Relaxation of Rule as to Parties in Special Cases.** — The rules upon the subject of parties are, however, very loose, and the questions arising under them are decided largely in the discretion of the court.¹ “The necessity for the relaxation of the rule is more especially apparent in the courts of the United State, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever.”² A court of equity adapts its decrees to the necessities of each case; and should a suit brought by a single complainant concerning a matter in which others as well as himself were interested terminate in a decree against the defendants, it is easy to do substantial justice to all the parties in interest, and prevent a multiplicity of suits, by allowing the other persons similarly situated with the plaintiff, “either through a reference to a master, or by some other proper proceeding, to come in and share in the benefit of the litigation.”³ The discretion as to the joinder or omission of parties is, however, one which, when properly raised, is subject to review upon appeal.⁴ An act of Congress relaxing or extending the rules as to parties in a particular case is constitutional.⁵

§ 60. **Restatement of the Rules as to Parties.** — The rules upon the subject may be summarily though roughly stated thus: —

I. All persons not too numerous, and whose joinder will not oust the jurisdiction of the court, who have any direct interest in obtaining or resisting the relief prayed for in a bill or granted in a decree which so disposes of the controversy as to prevent any

§ 58. ¹ *Plunket v. Penson*, 2 Atk. 51; *Penny v. Watts*, 2 Phillips, 149, 154; *Calvert on Parties* (2d ed.), Book I. ch. v., p. 70.

² *Penny v. Watts*, 2 Phillips, 149, 154; *Calvert on Parties* (2d ed.), Book I. ch. v.

§ 59. ¹ *Cameron v. McRoberts*, 3 Wheat. 591; *Elmendorf v. Taylor*, 10 Wheat. 152, 167; *Lewis v. Darling*, 16 How. 1; *Barney v. Baltimore City*, 6 Wall. 280; *Payne v. Hook*, 7 Wall. 425; *Barney v. Latham*, 103 U. S. 205; *Greene v. Sisson*, 2 Curtis, 171; *West v. Randall*, 2 Mason, 181; *Parsons v. Howard*, 2

Woods, 1; *Winter v. Ludlow*, 3 Phila. (Pa.) 464.

² Mr. Justice Davis in *Payne v. Hook*, 7 Wall. 425, 432.

³ Mr. Justice Davis in *Payne v. Hook*, 7 Wall. 425, 432. See s. c. as *Hook v. Payne*, 14 Wall. 252.

⁴ *Caldwell v. Taggart*, 4 Pet. 190; *Robertson v. Carson*, 19 Wall. 94; *Hoe v. Wilson*, 9 Wall. 501; *Railroad Company v. Orr*, 18 Wall. 471.

⁵ *United States v. Union Pacific R. R.*, 98 U. S. 569.

future litigation concerning the same, must be parties to a suit in equity.¹

II. No person without an interest in the contest or its settlement can be joined as a party except the officer or member of a corporation, who may be made a defendant to a bill praying relief against it, in order to compel from him a discovery of facts of which he acquired knowledge in his official capacity.²

III. If the persons having a common interest in the subject of the controversy or the question to be decided therein are numerous, they may in certain cases be represented, as plaintiffs or defendants, by others who hold the legal title in trust for them, or by one or more of their number suing, or more rarely being sued, in their behalf.³

IV. Persons having a mere formal interest, or an interest so far separable from that of the principal parties, that a decree disposing of the controversy as between the latter can be made and enforced without affecting their rights, may always be omitted when, by reason of their residence or citizenship, not within the jurisdiction of the court.⁴

V. All persons who have such an interest in the controversy that a decree cannot be enforced without directly affecting their rights, must be joined as parties; except possibly when their interest is very small, or has been created for the purpose of depriving the court of jurisdiction.⁵

VI. There is no need of joining as parties any against whom the plaintiffs waive their rights, or who are willing to allow the relief prayed for in the bill, unless their presence is necessary for the protection of those who have been made defendants.⁶

VII. The necessity of the joinder of parties is always in the sound discretion of the court, which adapts itself to the facts of each particular case.⁷

§ 61. **Objection for Want of Parties.** — An objection that there is a defect of parties may be taken by demurrer, plea, or answer,¹ or at the hearing; and if the absent persons are indispensable parties, even for the first time upon appeal;² although not if a

§ 60. ¹ §§ 42, 43, 50.

² § 44.

³ §§ 46, 47, 48.

⁴ §§ 50, 51, 52.

⁵ §§ 53, 54, 57.

⁶ § 55.

⁷ § 59.

§ 61. ¹ For the rules regulating the manner of taking the objection, see the chapters on those pleadings.

² *Hoe v. Wilson*, 9 Wall. 501.

decree has been made which cannot prejudice their interests.³ "If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of absent parties."⁴ The usual practice is for the court, if it considers the objection good, to allow the cause to stand over until the plaintiff shall amend his bill by bringing in the additional parties needed.⁵ If the omitted parties on account of their citizenship cannot be brought in, the court may retain the bill, and perhaps continue an injunction in accordance with its prayer, until the complainants have had a reasonable time to litigate the matters in controversy between themselves and the omitted parties in a court of competent jurisdiction; and if it should then appear by the judgment of such a court that the complainants have in equity a superior title to the omitted parties, proceed to a determination of the rights between the parties to the bill.⁶ If, however, the complainant does not within a reasonable time amend his bill, or, if so allowed by the court, proceed against the omitted parties, the court may dismiss his bill; but such dismissal must be without prejudice.⁷ "Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following (that is to say): 'set down upon the defendant's objection for want of parties.' And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties, but the court, if it thinks fit, shall be at liberty to dismiss the bill."⁸ A lack of proper parties is not a jurisdictional defect; and therefore, if pending the

³ §§ 52, 53. See *Keller v. Ashford*, 133 U. S. 610, 626.

⁴ Rule 53.

⁵ *Hunt v. Wickliffe*, 2 Pet. 201, 215.

⁶ *Mallow v. Hinde*, 12 Wheat. 193, 198, 199.

⁷ *Mallow v. Hinde*, 12 Wheat. 193, 199; *Hunt v. Wickliffe*, 2 Pet. 201, 215.

⁸ Rule 52.

decision of the court, upon an objection for the omission of a party whose presence would oust the circuit court of jurisdiction, he dies, and the defect is thereby cured, the court will retain the bill.⁹

§ 62. **Objection for Joinder of Improper Parties.** — If persons are improperly joined as plaintiffs, all the defendants may demur.¹ If a person is joined as a plaintiff without his consent, he may on motion upon notice to all parties have his name stricken out with costs to be paid by the plaintiff who has improperly brought him into the suit.² If a person having no interest in the controversy be improperly joined as defendant, he alone can demur.³ And no notice of his demurrer need be given to the other defendants,⁴ except in special cases where it is clearly for the latter's interest to retain him in the suit. If a misjoinder is apparent on the face of the bill it is more prudent to demur. If such an objection is not made till the hearing, the court may disregard it.⁵ It cannot be raised for the first time upon appeal.⁶ When a demurrer is sustained in favor of defendants improperly joined as having no interest in the controversy, the plaintiff will always be allowed to amend by striking out their names.⁷ If the bill is dismissed for a misjoinder of complainants and one of them appears to have a good cause for equitable relief, the dismissal must be without prejudice.⁸

⁹ *Harrison v. Rowan*, 4 Wash. C. C. 202, 208.

§ 62. ¹ *Cuff v. Platell*, 4 Russ. 242; *King of Spain v. Machado*, 4 Russ. 225; *Story's Eq. Pl.* § 544.

² *Calvert on Parties* (2d ed.), 430; *Keppell v. Bailey*, 2 M. & K. 517; *Titterton v. Osborne*, 1 Dickens, 350; *Wilson v. Wilson*, 1 J. & W. 459.

³ *Whitbeck v. Edgar*, 2 Barb. Ch. (N. Y.) 106; *Seymour v. Freer*, 8 Wall. 202, 218; *Buerk v. Imhaeuser*, 8 Fed. R. 457; *Story's Eq. Pl.* § 544.

⁴ *Anon.*, 9 Ves. 512; *Hodson v. Ball*,

11 Simons, 459; *Calvert on Parties* (2d ed.), 430.

⁵ *Story v. Livingston*, 13 Pet. 359; *Eades v. Harris*, 1 Y. & C. N. R. 235; *Raffety v. King*, 1 Keen, 601; *Mosley v. Taylor*, cited in 1 Keen, 601, s. c. 2 Y. & J. 520; *Calvert on Parties* (2d ed.), 156; *Story's Eq. Pl.* § 544.

⁶ *Livingston v. Woodworth*, 15 How. 546.

⁷ *Tryon v. Westminster Improvement Comm'rs*, 6 Jurist, n. s. 1324.

⁸ *House v. Mullen*, 22 Wall. 42.

CHAPTER IV.

BILLS.

§ 63. **Informations.** — The first proceeding in a suit in equity is the preparation and filing of the first pleading. This was either an information, a bill, or an information and bill. In England, the attorney-general or solicitor-general could file an information on behalf of the crown, or of those who either as idiots and lunatics partook of its prerogative, or whose rights, as those in charities, were under its particular protection. The law officers of the royal consort had the same right. If the suit did not immediately concern the rights of the crown, a relator, who sustained and directed the litigation, was usually joined with the officer in whose name it was filed. The main distinction between an information and a bill was, that, whereas the latter was in the form of a petition to the court; in the former the officer that filed it stated the case by way not of petition or complaint, but of information to the court of the rights which the crown claimed on behalf of itself or others, and of the invasion or detention of those rights for which the suit is instituted. If the relator had a personal interest in the relief sought, his personal complaint was joined to, and incorporated with the information given to the court by the officer of the crown; and the pleading was termed an information and bill.¹ The proceedings upon an information could only abate by the death or determination of interest of the defendant. If, however, the information were filed at the instance of one or more relators and all died, the court would not allow the cause to proceed till an order had been obtained giving leave to insert the name of a new relator, and one had been inserted accordingly. Otherwise, proceedings upon informations were substantially the same as upon bills, except that great laxity of practice was permitted when informations were filed on behalf of charities.² In the courts of the

§ 63. ¹ Mitford's Pl. ch. 1.

² Mitford's Pl. ch. 1; Story's Eq. Pl. § 8.

United States, it has been held to be the proper practice for the government to sue in equity in its own name by a bill similar to one filed by a private citizen;³ but a pleading styled an information filed on behalf of the United States, being in substance a bill, was sustained as such,⁴ and so was one filed on behalf of the United States by the district attorney for the northern district of New York.⁵ In the suit brought by the State of Florida against the State of Georgia to settle the boundary between them, the attorney-general of the United States was permitted to file an information praying "that he be permitted to appear in said case, and be heard in behalf of the United States, in such time and form as the court shall order;" and, although permission for him to take testimony in the name of Florida with its consent was refused, it was "Ordered, that the attorney-general have leave to adduce evidence, either written or parol, and to examine witnesses and file their depositions, in order to establish the boundary claimed by the United States."⁶ Informations have, however, been filed in equity in the courts of some of the individual States.⁷ "When the United States comes into a court of equity as a suitor, it is subject to the defences peculiar to that court."⁸ Such an information or bill should be filed in the name of the United States, not in the name of one of its law officers.⁹

§ 64. **Definition and Classification of Bills.** — The usual course, and the only one open to a private citizen, is the filing of a bill. The word bill is derived from the Latin *libellus*; and such a pleading is sometimes called an English bill; because at the time when pleadings at common law were in Law Latin or Law French, it was as now written in the English language.¹ A bill is a petition addressed to the judges of a court of equity, containing a statement of the facts which in the plaintiff's opinion

³ *Benton v. Woolsey*, 12 Pet. 27; *United States v. Hughes*, 11 How. 552, 558; s. c. as *Hughes v. United States*, 4 Wall. 232; *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black, 485, 492; *United States v. Union Pacific R. R.*, 98 U. S. 569; *Moffat v. United States*, 112 U. S. 24; *United States v. Minor*, 114 U. S. 233.

⁴ *United States v. Hughes*, 11 How. 552, 558; s. c. as *Hughes v. United States*,

4 Wall. 232. See *Benton v. Woolsey*, 12 Pet. 27.

⁵ *Benton v. Woolsey*, 12 Pet. 27.

⁶ *Florida v. Georgia*, 17 How. 478, 480, 523.

⁷ See for example *Attorney-General v. Butler*, 123 Mass. 306.

⁸ *United States v. White*, 17 Fed. R. 561, 565.

⁹ *Benton v. Woolsey*, 12 Pet. 27.

§ 64. ¹ Story's Eq. Pl. § 7.

give him a right to sue, and concluding with a prayer for the relief to which he deems himself entitled.

Quis, quid, coram quo, quo jure petatur, et a quo,
Recte compositus quisque libellus habet.²

Bills are divided by the books into three classes: original bills, bills not original, and bills in the nature of original bills. A fourth class, which may be termed original bills in the nature of bills not original, is recognized by the Federal courts. Original bills are those which relate to some matter not before litigated in the court at equity by the same parties standing in the same interests. Bills not original are those which relate to some matter already litigated in the court at equity by the same parties, or their representatives, and which are either an addition to, or a continuance of an original bill, or both. Bills in the nature of original bills are those which serve to bring before the court the proceedings and decree in a former suit, for the purpose of either obtaining the benefit of the same or procuring the reversal of the decision made therein.³ Original bills in the nature of bills not original are those having all the characteristics of original bills, except that the Federal courts will take jurisdiction of them without regard to the citizenship of the parties, or the other limitations of the original Federal jurisdiction.⁴ Original bills are of two kinds: those which pray relief, and those which do not pray relief. Original bills which pray relief are said to belong to three classes: bills which pray the decree of the court concerning some right claimed by the plaintiff in opposition to some right claimed by the defendant, bills of interpleader, and bills of *certiorari*. Original bills not praying relief are of two kinds: bills to perpetuate the testimony of witnesses, and bills of discovery. Bills not original are bills of revivor, supplemental bills, and bills of revivor and supplement. Bills in the nature of original bills are bills in the nature of supplemental bills, bills in the nature of bills of revivor, cross-bills, bills of review, bills impeaching decrees upon the ground of fraud, bills to suspend the operation of decrees on special circumstances or to avoid them on the ground of matter subsequent, and bills par-

² Com. Dig. Chancery E 2; Story's Eq. Pl. § 25.

³ Mitford's Pl. ch. 1, § 2; Story's Eq. Pl. § 16.

⁴ *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Krippendorf v. Hyde*, 110 U. S. 276; *Pacific Railroad of Missouri v. Missouri Pacific Ry. Co.*, 111 U. S. 505.

taking of the qualities of some one or more of these bills.⁵ If the court has jurisdiction of an original bill, it will take jurisdiction of bills not original, and bills in the nature of original bills growing out of the first suit, without regard to the citizenship of the parties thereto.⁶ And in certain other cases it will take jurisdiction of bills otherwise original which are so intimately connected with matters before the Federal court that it is in the interest of convenience and justice to have them disposed of before the same tribunal.⁷ These may be named original bills in the nature of bills not original. Such is a bill to obtain a judicial construction of previous decrees;⁷ a bill to obtain a determination of the rights of a claimant to a fund in the hands of a Federal marshal;⁸ a bill to stay proceedings at law;⁹ and a bill to set aside a decree.¹⁰ The peculiarities in the form and the procedure upon original bills not praying relief, bills not original, and bills in the nature of original bills, will be discussed in the latter part of this work. In this chapter, the form of original bills praying relief and, in the chapters immediately succeeding, the proceedings upon them, will be explained, beginning with the ordinary kind,—bills which seek relief concerning some right claimed by the plaintiff in opposition to one claimed by the defendant.

§ 65. **Frame of a Bill in Equity.**—Formerly, bills usually consisted of nine parts: the direction or address, the introduction, the premises or stating part, the common-confederacy clause, the charging part, the jurisdiction clause, the interrogating part, the prayer of relief, and the prayer of process.¹ Of these, however, the common-confederacy clause, alleging that the defendant or defendants are combining and confederating with some persons to the plaintiff unknown, whose names when discovered he prays leave to insert as defendants, which owed its origin to an idea that otherwise the bill could not be amended so as to add new

⁵ Mitford's Pl. ch. 1, § 2; Story's Eq. Pl. §§ 16-24.

⁶ *Clarke v. Mathewson*, 12 Pet. 164; *Jones v. Andrews*, 10 Wall. 327, 333; *Pacific R.R. of Missouri v. Missouri Pacific Ry. Co.*, 111 U. S. 505. See § 21.

⁷ *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609. See § 21.

⁸ *Krippendorf v. Hyde*, 110 U. S. 276; *Freeman v. Howe*, 24 How. 450.

⁹ *Logan v. Patrick*, 5 Cranch, 288; *Dunn v. Clarke*, 8 Pet. 1; *Jones v. Andrews*, 10 Wall. 327, 333; *Dunlap v. Stetson*, 4 Mason, 349.

¹⁰ *Pacific Railroad of Missouri v. Missouri Pacific Railway Company*, 111 U. S. 505.

§ 65. ¹ Mitford's Pl. ch. 1, § 3; Story's Eq. Pl. §§ 26-48.

defendants, and its retention to the practice of taxing costs according to the length of the documents filed; the charging part, alleging the defence which it anticipated would be made by the defendant, and the reply which the plaintiff intended to make thereto; and the jurisdiction clause, alleging that the acts of the defendant which were complained of were contrary to equity, and that the plaintiff was without any remedy at law: were not even then considered necessary by the best authorities,² and by the equity rules have been expressly declared superfluous.³

§ 66. **The Address and Introduction.**—In England, a bill in chancery was required to be addressed to the person having the custody of the great seal, usually either the sovereign or the Lord Chancellor, except when the Lord Chancellor himself was the complainant, when it was addressed to the sovereign “in his high court of chancery.”¹ In the United States, as a great seal is not as in England essential to the validity of writs in equity, a bill is addressed to the judge or judges of the court where it is filed.² The introduction formerly contained the names, descriptions, and residences of the complainants, together with the character in which they sued, if in a representative capacity, and such other allegations as were necessary to found the jurisdiction of the court.³ Sometimes the names and descriptions of the defendants were also here inserted, but it was more usual to name them in the next part of the bill.⁴ The equity rules regulate the subject as follows: “Every bill in the introductory part thereof shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: ‘To the judges of the circuit court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says that,’ &c.”⁵ If one of the parties is a corporation the bill must state

² Mitford's Pl. ch. 1, § 3; Langdell's Eq. Pl. § 55; Story's Eq. Pl. §§ 29, 32, 33, 34; *Comstock v. Herron*, 45 Fed. R. 600.

³ Rule 21.

§ 66. ¹ Mitford's Pl. ch. 1, § 3; Story's Eq. Pl. § 26. ² Rule 20.

³ Mitford's Pl. ch. 1, § 3; Story's Eq. Pl. § 26.

⁴ Story's Eq. Pl. § 26. *Contra* *Leavenworth v. Pepper*, 32 Fed. R. 718.

⁵ Rule 20; *United States v. Pratt Coal & Coke Co.*, 18 Fed. R. 708; § 69.

by or under the laws of what State it was created, and its members will then be conclusively presumed to be citizens of that State.⁶ If one of the parties is an alien, it should aver that he is "a citizen and subject of a foreign State," specifying that State's name.⁷ How advantage could be taken of an omission in the introduction of the residence of the parties, whether by demurrer or simply by a motion for security for costs, was, under the old practice, a doubtful question.⁸ The bill is certainly demurrable if enough does not appear upon its face to show the court's jurisdiction.⁹ A defect in this respect in the introductory part of a bill is, it seems, not cured by an allegation in its title or caption.¹⁰ It has been said that no one can be made a defendant under a fictitious name;¹¹ but in an English case where the parents of an infant, who was a necessary defendant to a bill, refused to have her baptized in order to interpose difficulties in the plaintiff's way, Sir John Leach ordered that she should be described as "the youngest female child of A. B. (naming her father) and C. D. (naming her mother)."¹² Although this part of the bill should contain the statement that the complainant sues on behalf of others as well as himself, if he intends so to do, it has been suggested that this might not be necessary when his case is founded upon a statute "which itself gives that force and direction to the bill."¹³

§ 67. **The Narrative Part of a Bill.** — The most important portion of a bill in equity is the narrative or stating part. This contains the plaintiff's cause of action. "It should set forth the plaintiff's case in a clear and distinct narrative, with the facts relied upon as the basis of the suit. For convenience, each paragraph should be numbered, so that the successive allegations may be readily referred to."¹ The object of old common-law pleading was to bring the matter in controversy to certain distinct issues. In equity pleading no such attempt is made. The statement of the plaintiff's case in the bill differs little in language or form

⁶ *Lafayette Ins. Co. v. French*, 18 How. 404; *Muller v. Dows*, 94 U. S. 444; *Steamship Co. v. Tugman*, 106 U. S. 118.

⁷ *Wilson v. City Bank*, 3 Sumner, 422.

⁸ *Rowley v. Eccles*, 1 Sim. & S. 511; *Daniell's Ch. Pr.* (2d Am. ed.), 409.

⁹ *Bingham v. Cabot*, 3 Dall. 382; *Jackson v. Ashton*, 8 Pet. 148; *United States v. Pratt Coal & Coke Co.*, 18 Fed. R. 705.

¹⁰ *Jackson v. Ashton*, 8 Pet. 148. See *Sharon v. Hill*, 23 Fed. R. 353.

¹¹ *Kentucky Silver Mining Co. v. Day*, 2 Sawyer C. C. 468.

¹² *Eley v. Broughton*, 2 Sim. & S. 188.

¹³ *Irons v. Manufacturers' Nat. Bank of Chicago*, 17 Fed. R. 308.

§ 67. ¹ An omission to do this will not be a defect in pleading.

from any other statement of facts which might be drawn up for the information of third parties, say an application to a government board. The defendant's answer usually admits, or denies, or qualifies *seriatim* each statement in the bill; and occasionally, before proceeding to notice the statement in detail, the defendant gives a general history of the case from his own point of view. The issues, both of fact and of law, are thus often involved in large masses of statement, and have to be selected, so to speak, by the judge who tries the cause, with the assistance of the arguments of counsel. It would be difficult to imagine a less technical document than a bill in equity."² The bill must contain every fact essential to the plaintiff's cause of action. For no evidence will be admitted or considered to prove any fact not alleged in it.³ It must plead every fact essential to the rights of the plaintiff, and necessarily within his knowledge positively, not upon information and belief,⁴ and with certainty.⁵ Otherwise, it is demurrable. An allegation that an event occurred on or about a certain specified day is, however, sufficient.⁶ And less certainty is required concerning facts of which a discovery is sought from the defendant.⁷

§ 68. **Scandal and Impertinence.** — "Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, *in hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit."¹ "Facts not material to the decision are impertinent, and if reproachful they are scandalous; and, perhaps, the best test by which to ascertain whether the matter be impertinent is to try whether the subject of the allegation could be put in issue, and would be matter proper to be given in evidence between the

² Lectures before the Law School of Boston University on Equity Pleading by Judge Dwight Foster, MS. See Hayne Eq. 70.

³ Gordon v. Gordon, 3 Swanst. 400, 472; Miller v. Cotten, 5 Ga. 341, 346; Wilson v. Stolley, 4 McLean, 275; Crockett v. Lee, 7 Wheat. 522; Jackson v. Ashton, 8 Pet. 148; Henry v. Suttle, 42 Fed. R. 91. See chap. xii. on Amendments.

⁴ Lord Uxbridge v. Staveland, 1 Ves. Sen. 56; Egremont v. Cowell, 5 Beav.

620; Mitford's Pl. 40; Story's Eq. Pl. §§ 255, 256.

⁵ Harrison v. Nixon, 9 Pet. 483, 503; Wormald v. De Lisle, 3 Beav. 18; Brooks & Hardy v. O'Hara Brothers, 8 Fed. R. 529; Daniell's Ch. Pr. (2d Am. ed.) 421-425.

⁶ Richards v. Evans, 1 Ves. Sen. 39; Roberts v. Williams, 12 East, 33, 37; Leigh v. Leigh, Daniell's Ch. Pr. 369.

⁷ Towle v. Pierce, 12 Met. (Mass.) 329, 332; Lafayette Co. v. Neely, 21 Fed. R. 738.

§ 68. ¹ Rule 26.

parties.”² It is customary in bills seeking the protection or enforcement of rights depending upon complicated provisions of Federal or State statutes, to set forth such statutes either at length or according to their legal effect; and when the complainant depends upon historical facts, of which the court will take judicial notice, to state such facts also. Sometimes former decisions of the courts are similarly pleaded. Although this practice is not strictly correct, it is still convenient for the court as well as counsel, inasmuch as the case made by the bill is thereby made more easy of comprehension. It seems that exceptions to such allegations for impertinence cannot be sustained.³ If a bill contain scandalous or impertinent matter, “it may, on exceptions, be referred to a master by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.”⁴ “No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order when obtained shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.”⁵ It has been held in England that a person not a party to the suit may, by leave of the court, file exceptions to a bill for scandalous

² Chancellor Kent in *Woods v. Merrill*, 1 J. Ch. (N. Y.) 103, at p. 106. See also *Hood v. Inman*, 4 J. Ch. (N. Y.) 437. For an illustration of scandal, see the record in *United States v. Schurz*, 102 U. S. 378.

³ *Wells v. Oregon Railway & Naviga-*

tion Co., 15 Fed. R. 561; s. c. 8 Sawyer, 600; *Allen v. O'Donald*, 23 Fed. R. 573; *Steam Gauge & Lantern Co. v. McRoberts*, 26 Fed. R. 795.

⁴ Rule 26.

⁵ Rule 27.

matter reflecting upon himself;⁶ and that the court may of its own motion expunge scandalous matter at any time.⁷ Exceptions for impertinence cannot, however, be taken after answer.⁸ Neither scandal nor impertinence, however gross, is a ground for demurrer, it being a maxim of pleading that *utile per inutile non vitiatur*.⁹ It has been said that an exception for impertinence must be allowed in whole or not at all.¹⁰

§ 69. **Certainty.** — A bill must state the plaintiff's case with sufficient certainty. Thus a bill by a receiver of a national bank to recover for the loss caused to it by the negligence of its directors, which prays relief against the persons who have acted as directors during various periods of time, together with the representatives of such as are dead, must "state the dates of the losses sustained by the corporation and the dates of the acts or omissions contributing to those losses, with sufficient certainty to inform each of the defendants with which and how many of the losses it is sought to charge him."¹ A bill to enjoin the enforcement as a lien upon land of a judgment entered a few days after complainant had begun to erect a building upon such land under a contract with its owner which he claimed gave him priority under a mechanic's lien, was held demurrable for lack of certainty because it failed to set forth "the actual dates at which he commenced, carried on, and finished work and labor, and the actual dates on which he furnished materials," in order that the court might determine the validity and extent, and right to priority of the lien he claimed.² The bill must state facts, not conclusions of law, which will be disregarded by the court.³ Thus a general charge of fraud is not sufficient, but it must allege the specific acts or language which constitute the fraud.⁴ It has been held that a creditor's bill for an injunction and a receiver because of the fraudulent disposition of assets, need not describe the

⁶ *Williams v. Douglas*, 5 Beav. 82; *Daniell's Ch. Pr.* (2d Am. ed.) 402.

⁷ *Ex parte Simpson*, 15 Ves. 476; *Daniell's Ch. Pr.* (2d Am. ed.) 402, 403; *Story's Eq. Pl.* § 270. See also *Langdon v. Goddard*, 3 Story, 13.

⁸ *Story's Eq. Pl.* § 270.

⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 401. See also *Pacific Railroad of Missouri v. Missouri Pacific Ry. Co.*, 111 U. S. 505, 516, 522.

¹⁰ *Chapman v. School District No. 1*. Deady, 108, 117, *per* Deady, J.

§ 69. ¹ *Price v. Coleman*, 21 Fed. R. 357.

² *McKee v. Travelers' Ins. Co.*, 41 Fed. R. 117, 119.

³ *Harper v. Hill*, 35 Miss. 63.

⁴ *Gilbert v. Lewis*, 1 De G., J. & Sm. 38, 49; *Bryan v. Spruill*, 4 Jones Eq. (N. C.), 27; *United States v. Atherton*, 102 U. S. 372; *United States v. Norsch*, 42 Fed. R. 417. See *infra*, § 106.

assets.⁵ An allegation of a fraudulent intent has been held to be an allegation of a fact.⁶ A bill alleged "that the bank was insolvent on the 5th day of May; that this was well known to its officers; that it wrongfully neglected to disclose its insolvency to complainant, and, by continuing business and otherwise, represented to complainant and all other persons dealing with it, that it was solvent; that complainant, on the faith of these representations believed such to be the fact, without suspicion that the bank was, or was in danger of becoming, insolvent; that, acting upon the representations, and relying on the bank's solvency, complainant delivered the draft; that next morning the bank closed its doors, and the draft was collected thereafter; and that, by reason of the premises, the draft or its proceeds did not become the property of the bank." These allegations were held sufficient to charge fraud. "The omission to state in the pleading the degree of insolvency which rendered the bank's conduct fraudulent, was not fatal, as the conclusion asserted showed the intention of the pleader."⁷ It is not sufficient to state that the defendant is a trustee, without alleging the facts by which he is shown to be a trustee.⁸ An allegation that a defendant corporation is about to exceed its powers is insufficient. The bill must show what acts are threatened, and why they exceed the powers of the corporation.⁹ "The pleader should state the facts, and not formulate mere epithetic 'charges.' . . . If the facts are not to be ascertained by diligence, or because of some obstruction, or if the evidence of them is in possession of the other side, this should be made to appear, with technical averments showing the necessity of discovery, when that is wanted; but a court cannot sustain a bill upon mere denunciatory statements of the plaintiff's suspicions or belief. The best pleadings are those which state the inculpatory facts that carry with them their own conviction of the fraud, and by which the wrong-doing appears, without much necessity for characterizing it as such."¹⁰ The bill should usually state facts and not evidence. The English rule was that no admissions, whether written or oral, could be given in evidence

⁵ *Shainwald v. Lewis*, 6 Fed. R. 766, 775.

⁶ *Platt v. Mead*, 9 Fed. R. 91.

⁷ *St. Louis & S. F. Ry. Co. v. Johnson*, 133 U. S. 566, 577, 578.

⁸ *Evan v. Avon*, 29 Beav. 144.

⁹ *Leo v. Union Pac. Ry. Co.*, 19 Fed. R. 283.

¹⁰ *Lafayette Co. v. Neely*, 21 Fed. R. 738.

unless they had been specifically charged in the bill.¹¹ In this country, however, though the point has never been decided by the Supreme Court, we have the great authority of Judge Story, at circuit, holding that such a practice is unnecessary.¹² So, according to Professor Langdell, "when a bill charges a defendant with having had notice, or with having committed a fraud, or with insanity or drunkenness, or lewdness or misconduct in office, if the plaintiff intends to prove specific acts of notice, or of fraud, insanity, drunkenness, lewdness, or misconduct in office, it seems that such acts should be specifically charged in the bill. But this view is not fully supported by authority. It may also be stated generally, that whenever the plaintiff has evidence which is likely to take the defendant by surprise, it is the safer course to indicate its nature in the bill, rather than to run the risk of having it objected to at the hearing."¹³ But as the cases upon the authority of which he made these statements were decided when each party's evidence was unknown to the other until the hearing,—a method of taking testimony long since disused,¹⁴—it is not likely that the courts would be as strict now as formerly in requiring such evidence to be pleaded.¹⁵

§ 70. Inconsistency and Bills with a Double Aspect.—A bill must not state two inconsistent states of fact and ask relief in the alternative. But it may state the facts and ask relief in the alternative according to the conclusion of law that the court may draw from them, so that if one kind of relief sought be denied, another may be granted; and it may state facts of a different nature not inconsistent with each other, and equally supporting the prayer for relief. In both of these cases a bill is said to have "a double aspect."¹ Thus, a bill may state facts constituting an attempt to form a new corporation by the consolidation of two already existing, and pray that, if the new corporation have a legal existence, the plaintiff may be declared entitled to a certain number of shares therein, otherwise to a corresponding interest

¹¹ *Hall v. Maltby*, 6 Price, 240; *Evans v. Bicknell*, 6 Ves. 183; *Austin v. Chambers*, 6 Cl. & Fin. 38, *Story's Eq. Pl.* 265.

¹² *Smith v. Burnham*, 2 Sumner C. C. 612; *Jenkins v. Eldredge*, 3 *Story C. C.* 181, 283, 284; *Story's Eq. Pl.* § 265.

¹³ *Langdell's Eq. Pl.* § 60. See *Wes-ton v. Empire Assurance Corporation*,

L. R. 6 *Eq.* 23, *Clark v. Periam*, 2 *Atk.* 337; *Shepherd v. Morris*, 4 *Beav.* 252.

¹⁴ See Amendments to Rule 67, and Chapter on Evidence.

¹⁵ See *Smith v. Burnham*, 2 *Sumner C. C.* 612, 622; *Story's Eq. Pl.* § 265 a.

§ 70. ¹ *Shields v. Barrow*, 17 *How.* 130, 144; *Story's Eq. Pl.* §§ 426, note, 254.

in the stock of one of the old corporations.² The complainant may seek to quiet the title to lands, claiming either as devisee or as heir-at-law.³ A bill may contain a prayer that an agreement be either set aside as obtained by fraud, or else specifically enforced.⁴ A bill was sustained when filed by one partner against another, praying for specific performance of a contract for the sale of land, or else for an account of the partnership debts, and a charge of their amount upon the land as belonging to the assets of the firm.⁵ If the plaintiff wish to set aside a deed on account of fraud, imposition, and undue influence, he may allege both that the maker was insane and that he had a great imbecility of mind.⁶ But if he allege that a decree which he wishes to set aside was obtained either by mistake of all the parties, or by deception practised upon himself, or by collusion of the defendant with third parties, the bill will be demurrable for indefiniteness.⁷ In a recent case the court said: "To allege that a sale is simulated, and if not simulated is fraudulent, meaning thereby it is a sham sale, and if not a sham then a real sale, but fraudulent, may be consistent, but it is not certain; and certainty is a requisite in equity pleading as well as consistency. It seems to me that, if there is doubt as to the nature of the transaction, the creditor, who has 'to strike in the dark,' should charge a fraudulent simulation, and on discovery amend if necessary."⁸ A bill was sustained where the complainant sought specific performance of an agreement by his partner to transfer to him the latter's interest in certain land, or in the alternative to have the land charged with the debts of the copartnership.⁹ But it was held in England that a bill may not pray relief primarily against one of two defendants, and, in case the court should hold him free from liability, then against the other.¹⁰ A bill is bad when it contains two alternative claims each belonging to several persons, one of

² *Kilgour v. New Orleans Gas-Light Co.*, 2 Woods, 144, 148.

³ *Gaines v. Chew*, 2 How. 619, 643.

⁴ *Harlin v. Boyd*, 113 U. S. 756. But see *Shields v. Barrow*, 17 How. 130, 143; *St. Louis V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. R. 440, 448, 449.

⁵ *Hoxie v. Carr*, 1 Sumner, 173.

⁶ *Story's Eq. Pl.* § 254; *Bennet v. Vade*, 2 Atk. 325; *Colton v. Ross*, 2

Paige (N. Y.), 396; *Lloyd v. Brewster*, 4 *Paige* (N. Y.), 537.

⁷ *Brooks v. O'Hara*, 8 Fed. R. 529; s. c. 2 *McCrory*, 644. But see *Williams v. United States*, 138 U. S. 514, 517.

⁸ *Pardee, J.*, in *Socola v. Grant*, 15 Fed. R. 487, 489.

⁹ *Hoxie v. Carr*, 1 Sumner, 173.

¹⁰ *Clark v. Lord Rivers*, L. R. 5 Eq. 91, 97. But see *Kilgour v. New Orleans Gas-Light Co.*, 2 Woods, 144, 148.

whom has no interest in one claim, and others of whom have no interest in the other claim.¹¹ A bill should not pray in the alternative legal and equitable relief.¹² "When the pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the bill facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant in answering a case not founded on fraud is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing on that ground, on some other equity, a plaintiff failing on the first may succeed on the latter alternative. But then the attention of the defendant has been distinctly called to it, and he has been called upon to answer the case according to both alternatives. It is the duty of the judge to determine whether the two are so interwoven with each other that, on the failure of proof of fraud, it is impossible to treat the facts as separate allegations, justifying a separate mode of dealing with them."¹³ When a bill alleges both fraud and mistake, if the latter alone is proved the bill will be sustained.¹⁴ The averment "that if said intention is true, which is denied, then the said State law, to wit, the Act of No. 85 of 1888, is null and void, because it operates as a discrimination against the shareholders of national banks, in violation of the express terms of Section 5219 of the Revised Statutes of the United States;" is sufficient to raise the issue whether there is in the act any discrimination prohibited by the act of Congress.¹⁵ A bill to enjoin the infringement of a copyright may set forth an agreement between the author and the plaintiff, and then allege that if such agreement does not constitute an assignment of the copyright, it is an exclusive license.¹⁶

¹¹ Stebbins v. St. Anne, 116 U. S. 386.

¹² Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641, 651.

¹³ Dwight Foster's Lectures on Equity Pleading, MS.; Eyre v. Potter, 15 How. 42, 56; Britton v. Brewster, 2 Fed. R. 160; French v. Shoemaker, 14 Wall. 314, 335; Fisher v. Boody, 1 Curt. 206; Hoyt v. Hoyt, 27 N. J. Eq. 399; Wilde v. Gibson, 1 H. of L. Cases, 605; Hickson v.

Lombard, L. R. 1 H. of L. 326; Thomson v. Eastwood, L. R. 2 App. Cases, 215; Price v. Berrington, 2 Macn. & G. 486, 498.

¹⁴ Williams v. United States, 138 U. S. 514, 517.

¹⁵ Whitney Nat. Bank v. Parker, 41 Fed. R. 402, 406.

¹⁶ Black v. Henry G. Allen Co., 42 Fed. R. 618, 623.

§ 71. **Multifariousness in General.** — A bill must not be multifarious. Multifariousness consists in the joinder of two or more distinct and unconnected grounds for equitable relief, each of which might be the foundation for a separate bill. This may occur in three ways, — by a misjoinder of plaintiffs, by a misjoinder of defendants, and by a misjoinder of grounds for equitable relief held by and against the same parties.¹ “To lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition, is, upon the authorities, utterly impossible. The cases upon the subject are extremely various, and the court in deciding them seems to have considered what was convenient in particular circumstances, rather than to have attempted to lay down any absolute rule.”² “The only way of reconciling the authorities upon the subject is by advert- ing to the fact that, although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two distinct kinds. Frequently the objection raised, though termed multifariousness, is in fact more properly misjoinder; that is to say, the cases or claims united in the bill are of so different a character that the court will not permit them to be litigated in one record. It may be that the plaintiffs and defendants are parties to the whole of the transactions which form the subject of the suit, and nevertheless these transactions may be so dissimilar that the court will not allow them to be joined together, but will require distinct records. But what is more familiarly understood by the term ‘multifariousness,’ as applied to a bill, is where a party is able to say he is brought as a defendant upon a record, with a large portion of which, and of the case made by which, he has no connection whatever.”³ There is, however, little practicable good to be obtained from a maintenance of this distinction except as a means of elucidating some of the expressions in the earlier authorities.⁴ “The decisions on this subject are contradictory and unsatisfactory. The common-sense rule in such cases is that an individual shall not be called to maintain his title or shall not assert it in connection with others to which it has no analogy, and in the inves-

§ 71. ¹ Calvert on Parties, Book I. ch. vii.

² Lord Cottenham in *Campbell v. Mackay*, 1 M. & Cr. 603, 618.

³ Lord Cottenham in *Campbell v. Mackay*, 1 M. & Cr. 603, 618. Approved in *Shields v. Thomas*, 18 How. 253, 259.

⁴ See Calvert on Parties, Book I. ch. vii.

tigation of which the costs and complexity of the case will be increased.”⁵

§ 72. **Multifariousness by Misjoinder of Plaintiffs.** — No persons can unite as complainants in a bill in equity unless they have a joint or common interest in obtaining the same relief.¹ Thus if one of them has no interest in the relief claimed, the bill is demurrable.² Those who claim the return of money paid by them severally on distinct promissory notes cannot join their claims in the same bill;³ nor can several creditors claiming under several obligations unite in a suit to attach the debts of an absent debtor.⁴ Persons who were defrauded of stock in a corporation by the men who promised it to them before the organization of the corporation cannot join in bill to compel the issue of the stock to each of them.⁵ Persons who have been separately indicted for similar acts committed while acting as agents for the same principal cannot join in a bill to enjoin the further prosecution of the indictments.⁶ But in a bill to compel specific performance of a decree in a former suit, all the complainants in the first suit may join as plaintiffs, though the decree sought to be enforced orders the payment of specific sums severally to each of them.⁷ Plaintiffs with conflicting interests cannot so join.⁸ Such are, in a suit for the construction of a will, persons, each of whom is interested in having a different construction put upon it.⁹ Nor can two join in a bill to set aside a fraudulent conveyance of land, of whom one claims the land as a creditor of the person who has made the conveyance, and the other as the purchaser of the land upon a sheriff's sale to satisfy a judgment held by him.¹⁰ But the interests of the complainants need not be coextensive. Thus, a tenant for life and the remainder-men of an estate, either legal or equitable, may join in a suit to protect the estate.¹¹ Although

⁵ Mr. Justice McLean in *Turner v. American Baptist Missionary Union*, 5 McLean, 344, 349.

§ 72. ¹ Story's Eq. Pl. § 279; *Calvert on Parties* (2d ed.), 105, 110.

² *Walker v. Powers*, 104 U. S. 245, 249; *Doggett v. Railroad Co.*, 99 U. S. 72.

³ *Yeaton v. Lenox*, 8 Pet. 123.

⁴ *Yeaton v. Lenox*, 8 Pet. 123. But see *Norris v. Hassler*, 22 Fed. R. 401; *Langdon v. Branch*, 37 Fed. R. 449.

⁵ *Summerlin v. Fronterizac S. M. & M. Co.*, 41 Fed. R. 249.

⁶ *Woolstein v. Welch*, 42 Fed. R. 566.

⁷ *Shields v. Thomas*, 18 How. 253.

⁸ *Walker v. Powers*, 104 U. S. 245; *Saumarez v. Saumarez*, 4 Mylne. & Cr. 331, 336; *Parsons v. Lyman*, 4 Blatchf. C. C. 432; *Bell v. Cureton*, 2 M. & K. 503.

⁹ *Parsons v. Lyman*, 4 Blatchf. C. C. 432; *Saumarez v. Saumarez*, 4 M. & Cr. 331, 336.

¹⁰ *Walker v. Powers*, 104 U. S. 245.

¹¹ Story's Eq. Pl. § 279 a; *Buckeridge v. Glasse*, 1 Cr. & Phill. 126; *Calvert on Parties* (2d ed.) 99.

usually there must be some privity between the complainants in a bill, yet in certain cases those between whom there is no privity are allowed to sue together when they seek to avert an injury which will affect them all alike. Thus, several tenants or parishioners may unite in a bill of peace seeking to dispose of a disputed right claimed against them by the lord of the manor¹² or the parson of the parish.¹³ And the owners of several lots of land claiming under a common source of title may unite in a bill of peace against several other claimants to the same lots, who also rely upon a common source of title adverse to that of the complainants.¹⁴ Several claimants in possession of several parcels of land whose rights depend upon the same question of fact or law may unite in a bill of peace against the same defendant who claims title to all the land by reason of the same disputed facts or legal proposition.¹⁵ It has been said that the owners of adjacent property may maintain a bill in equity to enjoin a defendant from erecting a livery stable or other nuisance in their vicinity.¹⁶ But another case holds that different persons, each of whom will suffer a distinct injury from the levy of a tax, cannot unite in a bill to enjoin its levy on account of its alleged unconstitutionality.¹⁷ Several stockholders who have been compelled to pay corporate debts have been allowed to join in a bill against another stockholder to compel him to contribute his proportion.¹⁸

§ 73. **Multifariousness by Misjoinder of Defendants.**—No persons can be joined as defendants to a bill in equity who have not a joint or common interest in opposing the relief prayed for.¹ Different relief may, however, be obtained against different defendants when the bill seeks to prevent or annul the effect of acts in pursuance of a common scheme, or so connected with each other as to form part of the same transaction.² The rule was

¹² *Anon.*, 1 Chan. Cas. 269; *Smith v. Earl Brownlow*, L. R. 9 Eq. 241.

¹³ *Rudge v. Hopkins*, 2 Eq. Cas. Abr. 170.

¹⁴ *Crews v. Burcham*, 1 Black. 352.

¹⁵ *Osborne v. Wisconsin Cent. R. Co.*, 43 Fed. R. 824. See *Central Pacific R. R. Co. v. Dyer*, 1 Saw. 641; *infra*, § 73.

¹⁶ *Flint v. Russell*, 5 Dill. 151. See also *Parker v. Nightingale*, 6 Allen (Mass.), 341. But *contra*, *Hudson v. Madison*, 12 Simons, 416.

¹⁷ *Cutting v. Gilbert*, 5 Blatchf. C. C. 259. See, however, *Central Pacific R. R. v. Dyer*, 1 Saw. 641; *Union Pacific R. R. v. McShane*, 3 Dill. 303.

¹⁸ *Allen v. Fairbanks*, 45 Fed. R. 445.

§ 73. ¹ *Calvert on Parties*, Book I. ch. vii; *United States v. Alexander*, 4 Cranch C. C. 311.

² *Calvert on Parties*, Book I. chap. vii; *Manners v. Rowley*, 10 Simons, 470.

thus stated by Sir John Leach: "In order to determine whether a suit is multifarious, or in other words, contains distinct matters, the inquiry is not, as this defendant supposes, whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole object."³ "The entirety of the case against one defendant constitutes the connecting link."⁴ But a bill is multifarious, when the charge against one defendant is in no way connected with those against other defendants.⁵ A bill is multifarious which seeks both to foreclose a mortgage and to restrain another defendant from asserting a claim of title adverse to both mortgagee and mortgagor,⁶ at least when such adverse title occurred prior to the mortgage.⁷ But a party claiming a lien upon the property by a judgment against the mortgagor prior to the mortgage, the validity of which lien is contested by the mortgagee, may be joined as a party defendant to a foreclosure suit.⁸ A bill is multifarious which seeks to obtain a transfer of land from one defendant, and to restrain another from asserting a conflicting claim to the same;⁹ and a bill by an executor to settle the conflicting controversies between himself, the heirs of his testatrix, the heirs of her husband, both of whom dispute bequests under her will, and one claiming to be a creditor of her estate.¹⁰ An English case holds that different violators of the same copyright cannot be enjoined by the same bill when their acts of piracy were not performed in confederacy with each other.¹¹ But this case has been doubted by Judge Story,¹² and distinguished by

³ *Salvidge v. Hyde*, 5 Maddock, 138, see *Mendenhall v. Hall*, 134 U. S. 559, 146. 568.

⁴ *Calvert on Parties* (2d ed.), 98; quoting Sir John Leach in *Turner v. Robinson*, 1 Sim. & S. 313; and Lord Cottenham in *Attorney-General v. Corporation of Poole*, 4 M. & Cr. 17, 31. ⁷ *Mendenhall v. Hall*, 134 U. S. 559, 568.

⁵ *Wood v. Dummer*, 3 Mason, 308; *West v. Randall*, 2 Mason, 181, 200; *Lewarne v. Mexican International Imp. Co.*, 38 Fed. R. 629. ⁸ *Converse v. Michigan Dairy Co.*, 45 Fed. R. 18.

⁹ *Copen v. Flesher*, 1 Bond, 440.

¹⁰ *Haines v. Carpenter*, 1 Woods, 262.

¹¹ *Dilly v. Doig*, 2 Ves. Jr. 486. See *Thomas H. El. Co. v. Sperry El. Co.*, 46 Fed. R. 75.

¹² *Story's Eq. Pl.* §§ 277, 278.

Chancellor Kent;¹³ and the courts might perhaps refuse to follow it here.¹⁴ Persons who are acting in concert as employees of the same corporation in the infringement of a patent may be joined as defendants to a bill.¹⁵ Several insurance companies may join in a bill to set aside on the same grounds an award made against them in defendant's favor upon several policies of fire insurance owned by them separately.¹⁶ A bill filed by an assignee in bankruptcy against all the incumbrancers of his assignor's estate, some but not all of whom had liens upon the same property, to set aside their liens as fraudulent, and to have the property sold for the common benefit of the creditors, was held not multifarious.¹⁷ A bill filed by the beneficiary under several deeds of trust, some upon different parts of the same property, one covering the entire property, against the trustees, the trustor, and the different persons claiming liens upon the property, was held not multifarious.¹⁸ A bill was sustained when filed by one of the next of kin against both an administrator and his sureties, to obtain the plaintiff's share of the estate.¹⁹ A creditor's bill may be filed against the members of two different firms when some are members of both.²⁰ A bill may be filed by the holder of a bond secured by a lien upon the property of a corporation against both the corporation and its stockholders, at the same time to foreclose his lien, and compel the stockholders to pay so much of the balance of their subscriptions to the stock of the corporation as will suffice for the payment of the deficiency after the foreclosure sale.²¹ A bill of peace may be filed to dispose of the claims of a number of defendants, which all depend on the determination of a single question of fact or law.²² Such are a bill by a parson or lord of a manor to establish a claim against all of his parishioners²³ or tenants;²⁴ a bill by

¹³ *Brinkerhoff v. Brown*, 6 J. Ch. (N. Y.) 139, at p. 155.

¹⁴ See *Foxwell v. Webster*, 10 Jur. n. s. 137.

¹⁵ *Poppenhusen v. Falke*, 4 Blatch. C. C. 493.

¹⁶ *Hartford Fire Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. R. 152.

¹⁷ *McLean v. Lafayette Bank*, 3 McLean, 415. See also *Jones v. Slausson*, 33 Fed. R. 632; *Potts v. Hahn*, 32 Fed. R. 660.

¹⁸ *Grant v. Phoenix Life Ins. Co.*, 121 U. S. 105.

¹⁹ *Payne v. Hook*, 7 Wall. 425.

²⁰ *Nelson v. Hill*, 5 How. 127. See also *Oliver v. Piatt*, 3 How. 333. But see *Griffin v. Merrill*, 10 Md. 364.

²¹ *Manufacturing Company v. Bradley*, 105 U. S. 175.

²² *Gaines v. Chew*, 2 How. 619; *United States v. Curtner*, 26 Fed. R. 296, 298; *Hyman v. Wheeler*, 33 Fed. R. 329.

²³ *Brown v. Vermuden*, 1 Chan. Cas. 272.

²⁴ *Conyers v. Lord Abergavenny*, 1 Atk. 285.

the owner of a fishery to establish his claim against a number of riparian owners; ²⁵ a bill by a city to establish its claim to a tax against several of the class liable to it; ²⁶ a bill by a railroad company to restrain the tax-collectors of different counties from levying taxes separately assessed, but part of each of which is to be paid to the State, and the validity of all of which depends upon the construction of a single statute; ²⁷ a bill by a railroad company to quiet its title against a number of claimants to land in severalty, the validity of the separate title of each of whom depends upon the construction of one statute; ²⁸ and a bill by an heir-at-law against the executors of an invalid will, and all who have purchased from them the land belonging to the ancestor's estate. ²⁹

§ 74. **Multifariousness without Misjoinder of Parties.**—Multifariousness may also exist without a misjoinder of parties, when two or more distinct and unconnected grounds of equitable relief are joined in the same bill. The grounds of relief must be different, and each ground must be sufficient as stated to sustain a separate bill.¹ Thus, a bill is multifarious when filed by the receiver against the directors of a national bank to recover claims for losses suffered by the corporation by reason of the directors' negligence, and claims for losses suffered by the stockholders by reason of having been induced to subscribe for new shares by misrepresentations of the directors.² So is a bill which seeks an account of a trust held by all of the defendants, and also seeks to set aside the effects of a distinct and independent fraud upon the trustor committed by one only of them.³ So was held, a bill which alleged that complainant's title to certain property had been so thoroughly established by adjudication that further litigation would be vexatious, and prayed that defendant might be enjoined from any further litigation affecting the same, and which also claimed the enforcement of a statutory right to require the defendant's claim of title to be now set up, tried, and determined.⁴

²⁵ *Mayor of York v. Pilkington*, 1 Atk. 284.

²⁶ *City of London v. Perkins*, 3 Bro. Parl. Cas. 602.

²⁷ *Union Pacific R. R. v. McShane*, 3 Dill. 303.

²⁸ *Central Pacific R. R. Co. v. Dyer*, 1 Saw. 641. See *Osborne v. Wisconsin Cent. R. Co.*, 43 Fed. R. 824; *supra*, § 72.

²⁹ *Gaines v. Chew*, 2 How. 619.

§ 74. ¹ *Brown v. Safe Deposit Co.*, 128 U. S. 403.

² *Price v. Coleman*, 21 Fed. R. 357. See also *Lewarne v. Mexican International Imp. Co.*, 38 Fed. R. 629.

³ *West v. Randall*, 2 Mason, 181. But see *Mills v. Hurd*, 32 Fed. R. 127.

⁴ *Lehigh Zinc Stove Co. v. N. J. Zinc & Iron Co.*, 43 Fed. R. 545.

So is a bill by one heir-at-law of a deceased married woman against her husband and the other heirs, to set aside both her marriage settlement and her will. For "in these two matters the necessary parties to the suit may be the same, but their interests and attitude are decidedly at variance."⁵ A bill to determine conflicting claims to land, and also asking for a partition of the land after the title should be determined, has been held multifarious;⁶ and so has a bill asking for a discovery by the defendant of an application for a policy of life insurance, and for the specific performance of an agreement to issue the policy sought in the application,⁷ and a bill praying an injunction against the building of a railroad or in the alternative an award of damages or compensation for land proposed to be taken by the railroad company.⁸ It has also been held multifarious to sue in one bill for an injunction against the violation of several distinct patents;⁹ but not if the infringement is made by the use or manufacture of a single machine.¹⁰ In the latter case the bill should so allege. It has been said that the complainant "should aver that said inventions are capable of conjoint as well as separate use, and are so used by the defendants."¹¹ A bill seeking an injunction with damages, against the infringement of a patent, and an injunction with damages against the publication of libellous circulars affecting plaintiff's patent, has been held multifarious.¹² It is not multifarious to seek in the same bill to reform a written agreement on account of a mistake, and to enforce its performance as reformed;¹³ nor to seek to set aside and cancel an insurance policy and enjoin the further prosecution of an action to recover premiums paid upon it;¹⁴ nor to compel the issue of such a policy,

⁵ *McDonnell v. Eaton*, 18 Fed. R. 710.

⁶ *Chapin v. Sears*, 18 Fed. R. 814.

⁷ *Markey v. Mutual Benefit Life Ins. Co.*, 6 Ins. L. J. 537.

⁸ *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U. S. 641, 651. But see *S. v. 135 U. S.* at pages 651-652, cited *infra*, § 123.

⁹ *Hayes v. Dayton*, 8 Fed. R. 702; *Stickle v. South St. Louis Foundry Co.*, 22 Fed. R. 105.

¹⁰ *Nourse v. Allen*, 4 Blatchf. C. C. 376; *Perry v. Corning*, 7 Blatchf. C. C. 195; *Case v. Redfield*, 4 McLean, 526; *Gamewell Fire Alarm Tel. Co. v. City of Chillicothe*, 7 Fed. R. 351; *Nellis v. McLana-*

han, 6 Fisher's Pat. Cas. 286. See *United States v. Am. Bell Telephone Co.* 128 U. S. 315.

¹¹ *Gamewell Fire Alarm Telegraph Co. v. City of Chillicothe*, 7 Fed. R. 351; *Nellis v. McLanahan*, 6 Fisher's Pat. Cas. 286.

¹² *Fougeres v. Murbarger*, 44 Fed. R. 292. See *International Tooth-Crown Co. v. Carmichael*, 44 Fed. R. 349; cited *supra*, § 71, and *infra*, § 77.

¹³ *Gillespie v. Moon*, 2 J. Ch. (N. Y.) 585.

¹⁴ *Equitable Life Assurance Soc. v. Patterson*, 1 Fed. R. 126.

and at the same time collect its amount.¹⁵ Nor is a bill against a single defendant to collect assessments on account of the same improvement made against several different lots owned by him which do not adjoin each other.¹⁶ Nor a bill filed by one railway company against another to compel an accounting as to the disposition and proceeds of bonds issued by the former to the latter, and the payment of the damages resulting from the foreclosure of the mortgage given to secure those bonds, and to recover the rents due under a lease of the plaintiff's road; when the execution of this lease and the issue of these bonds were parts of the same transaction.¹⁷ Nor a bill by the United States to set aside a land-patent for fraud, obtain an accounting of the rents and profits of the land, and recover damage for waste.¹⁸ Nor a bill to dissolve a partnership, which alleges that complainant was induced by fraud to enter into the agreement of partnership, that the defendant partner wilfully neglects to comply with the agreement, and that the business is being conducted at a loss.¹⁹

§ 75. **Objections for Multifariousness.** — An objection to a bill as multifarious should be raised by demurrer.¹ If not apparent upon the face of the bill, it is very doubtful whether it can be raised by plea or answer.² It can never be taken for the first time at the hearing³ or upon appeal;⁴ but the court may, of its own motion, dismiss a bill for multifariousness at any time;⁵ and perhaps the objection that the rights of the complainants are inconsistent can be raised at the hearing.⁶ It has been said that the objection cannot be taken by a defendant who is not injured by it.⁷ The misjoinder of a defendant against whom the bill states no ground for relief is not a cause for a demurrer by the

¹⁵ *Hebert v. Mutual Life Ins. Co.*, 12 Fed. R. 807; *Brugger v. State Investment Ins. Co.*, 5 Saw. 304.

¹⁶ *Fitch v. Creighton*, 24 How. 159.

¹⁷ *Pacific R. R. (of Missouri) v. Atlantic & Pacific R. R. Co.*, 20 Fed. R. 277.

¹⁸ *United States v. Pratt Coal & Coke Co.*, 18 Fed. R. 708.

¹⁹ *Rosenstein v. Burns*, 41 Fed. R. 841.

§ 75. ¹ *Nelson v. Hill*, 5 How. 127.

² *Benson v. Hadfield*, 4 Hare, 32; *Greenwood v. Churchill*, 1 M. & K. 559; *Gibbs v. Claggett*, 2 Gill & J. (Md.) 14; *Putnam v. Hollander*, 6 Fed. R. 882. See §§ 77, 110; *Story's Eq. Pl.* § 747; *Beames on Pleas*, 157, 158.

³ *Greenwood v. Churchill*, 1 M. & K. 559; *Oliver v. Piatt*, 3 How. 333, 412; *Nelson v. Hill*, 5 How. 127; *Bowman's Devises v. Wathen*, 2 McLean, 376.

⁴ *Oliver v. Piatt*, 3 How. 333, 412; *Barney v. Latham*, 103 U. S. 205, 215; *Converse v. Michigan Dairy Co.*, 45 Fed. R. 18.

⁵ *Oliver v. Piatt*, 3 How. 333, 412; *Nelson v. Hill*, 5 How. 127, 132; *Greenwood v. Churchill*, 1 M. & K. 559; *Ohio v. Ellis*, 10 Ohio, 456.

⁶ *Davies v. Quaterman*, 4 Y. & Coll. 257.

⁷ *Buerk v. Imhaeuser*, 8 Fed. R. 457.

other defendants.⁸ Multifariousness as to subjects or parties does not render a decree void, so that it can be treated as a nullity in a collateral action.⁹ It has been held in other courts, that a bill is not multifarious which joins an insufficient with a good case for equitable relief, when there is no misjoinder of parties, and that the proper course of the defendant is to demur to so much of the bill as is insufficient;¹⁰ but a bill is multifarious which joins two inconsistent complaints by different plaintiffs,¹¹ although the case shown by the principal plaintiff is insufficient. It is within the constitutional power of Congress to pass a law allowing, in a single specified suit against a corporation chartered by it, matters and defendants to be joined in a manner that would otherwise constitute multifariousness.¹² When an objection for multifariousness is sustained, the complainant will always be allowed, if he asks leave to do so, to amend upon payment of costs, unless his bill be otherwise fatally defective.¹³ The cases show a tendency towards holding that multifariousness depends so much upon the discretion of the courts of first instance, that a decision overruling an objection upon that ground would not be reviewed upon appeal.¹⁴ In no case has the Supreme Court of the United States reversed a decree on account of multifariousness in the bill. In general, it may be remarked that multifariousness is an objection much more often taken than sustained.

§ 76. **Special Provisions of the Federal Equity Rules and Practice.** — “The plaintiff may in the stating or narrative part of his bill state, and avoid, by counter-averments at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief.”¹ Such matter was formerly included in a separate part called the *charging part* of the bill, which, how-

⁸ Warthen v. Brantley, 5 Ga. 571; Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106; Miller v. Jamison, 9 C. E. Green (N. J.), 41; Story's Eq. Pl. § 544.

⁹ Hefner v. Northwestern Life Ins. Co., 123 U. S. 747.

¹⁰ McCabe v. Bellows, 1 Allen (Mass.), 269; Shavely v. Harkrader, 29 Gratt. (Va.) 112; Story's Eq. Pl. § 283. See Brown v. Guarantee Trust Co., 128 U. S. 403.

¹¹ Walker v. Powers, 104 U. S. 245, 249.

¹² United States v. Union Pacific R. R., 98 U. S. 569.

¹³ Walker v. Powers, 104 U. S. 245, 249; Price v. Coleman, 21 Fed. R. 357.

¹⁴ See Gaines v. Chew, 2 How. 619; Oliver v. Piatt, 3 How. 333; Barney v. Latham, 103 U. S. 205; Sheldon v. Keokuk N. L. Packet Co., 8 Fed. R. 769; Daniell's Ch. Pr. 335, note 2.

§ 76. ¹ Rule 21.

ever, was never indispensable.² It is often important for the plaintiff to thus meet a defense which he anticipates. For as special replications are not allowed, he may thus save the delay of an enforced amendment of his bill, in order to plead new matter as a reply to a defense in the answer. "If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they cannot be joined without ousting the jurisdiction of the court as to other parties."³ These averments should be included in this part of the bill. "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains; or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."⁴ This rule does not apply to suits brought by the stockholders of a corporation after its dissolution;⁵ nor to a suit to restrain corporate action to which the president of the corporation is made a party solely for purposes of discovery;⁶ nor to a case where it clearly appears that the corporation would certainly refuse to exercise the right upon which the suit is founded.⁷ But it has been said, that "it is not enough to say that it appears from the bill that the corporation would probably refuse relief. The rule is imperative that efforts should be made to obtain relief in that direction before such a suit as this shall be

² Story's Eq. Pl. § 33; Langdell's Eq. Pl. § 55.

³ Rule 22.

⁴ Rule 94. See also *Hawes v. Oakland*, 104 U. S. 450; *Huntington v. Palmer*, 104 U. S. 482; *Dodge v. Woolsey*, 18 How. 331; *Greenwood v. Freight Co.*, 105 U. S. 13, 16; *Detroit v. Dean*, 106 U. S. 537, 542; *County of Tazewell v. Farmers'*

Loan & Trust Co., 12 Fed. R. 752; *Dimpfell v. Ohio & Miss. R. R. Co.*, 110 U. S. 209; *Quincy v. Steel*, 120 U. S., 241; §§ 12, 87, 207.

⁵ *Lafayette Co. v. Neely*, 21 Fed. R. 738.

⁶ *Leo v. Union Pacific Ry. Co.*, 17 Fed. R. 273.

⁷ *County of Tazewell v. Farmers' Loan & Trust Co.*, 12 Fed. R. 752.

commenced.”⁸ It has been said that “the bill may show that there was no necessity for efforts to be made with the shareholders, but not so as to the directors.”⁹ An allegation “that this suit is brought in good faith, and for the collection of, and to compel the collection of, what your orator believes to be a meritorious claim,” is not equivalent to the allegation “that the suit is not a collusive one, to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.”¹⁰ In cases where the jurisdiction of the court depended upon the amount involved, it has been held at circuit that the bill should show that the value of the matter in dispute exceeds the jurisdictional amount.¹¹ If a bill be filed to impeach a patent or other grant by the United States and be not brought by the Attorney-General, or some other officer authorized by statute to do so, it must contain an allegation that the Attorney-General has “given such order for its institution as will make him officially responsible for it, and show his control over the cause.”¹² The signature of the Attorney-General subscribed to the bill is sufficient to show his authority for filing it.¹³

§ 77. **Bills to enjoin the Infringement of Patents.** — A bill to restrain the infringement of a patent must contain an allegation that the complainant or the person through whom he claims was the inventor or discoverer of the thing or process patented.¹ It must also contain a substantial description of the patent or else set out the patent itself, or have the same annexed as an exhibit.² The history of the invention, and a description of patents issued to the complainant before that sued upon, are proper averments.³ It is also proper to describe previous litigation over the same or similar patents.⁴ It has been held to be a sufficient allegation of title and infringement for the plaintiff to allege: that he

⁸ McCrary, J., orally in *Foote v. Cunnard Mining Co.*, 17 Fed. R. 46, 48.

⁹ *Squair v. Lookout Mountain Co.*, 42 Fed. R. 729, 731.

¹⁰ *Quincy v. Steel*, 120 U. S. 241, 246, 247.

¹¹ *United States v. Pratt Coal & Coke Co.*, 18 Fed. R. 708; *Murphy v. East Portland*, 42 Fed. R. 308; *Lehigh Zinc & Iron Co. v. N. J. Zinc & Iron Co.*, 43 Fed. R. 545, 546; *Oleson v. Northern R. Co.*, 43 Fed. R. 112.

¹² Mr. Justice Miller in *United States v. Throckmorton*, 98 U. S. 61, 71.

¹³ U. S. v. Mullan, 10 Fed. R. 785; s. c. 118 U. S. 271.

§ 77. ¹ *Sullivan v. Redfield*, 1 Paine, 441.

² *Strirrat v. Excelsior Manuf. Co.*, 44 Fed. R. 142.

³ *Steam Gauge & Lantern Co. v. McRoberts*, 26 Fed. R. 765.

⁴ *Steam Gauge & Lantern Co. v. McRoberts*, 26 Fed. R. 765; *American Bell Tel. Co. v. Southern Tel. Co.*, 34 Fed. R. 803.

“was the true, original, and first inventor of a certain new and useful improved application of steam power to the capstan of vessels, not known or used before;” “that a description or specification of the aforesaid improvement was given in his schedule to the aforesaid letters-patent annexed, accompanied by certain drawings referred to in said last mentioned schedule, and forming parts of said letters-patent, — the said letters-patent and the said specification thereto annexed (which, or an exemplified copy of which, your orators will produce, as your honors may direct) were duly recorded in the patent office;” and “that the defendant is now constructing, using, and selling steam-power capstans for vessels in some parts thereof substantially the same in construction and operation as in the said letters-patent mentioned.”⁵ A bill for an injunction and an accounting was held to be good on demurrer, although it did not allege that the complainant was engaged in using the invention patented, or that it was a source of profit to him, when it alleged that the defendant had made profits by the use of the invention.⁶ When a bill alleged “that the patentee was the original, first, and sole inventor of a certain new and useful improvement in the construction of cable railways, fully described in the specification of the said letters-patents, which had not been patented to himself or to others, with his knowledge or consent, in any country, and had not, to his or the orator’s knowledge, been in public use or on sale in the United States for more than two years prior to his invention and discovery thereof, and application for letters-patent of the United States therefor,” it was held sufficient.⁷ A bill which alleged that a complainant had obtained a certain patent, that the defendant had obtained patents of a later date which interfered with complainant’s rights, and that defendant is making and selling machines under his patents, and has in other ways disturbed complainant in the use and enjoyment of the rights granted by his patent, was held sufficiently to charge interference.⁸ The allegation “as by the said letters-patent and specification, all in due form of law ready in court to be produced, will fully appear.” is equivalent to *proferet* in the most formal and ample terms. It

⁵ M’Millin v. St. Louis & Mississippi Valley Transportation Co., 18 Fed. R. 260, 261. See M’Coy v. Nelson, 121 U. S. 484.

⁶ Wirt v. Hicks, 46 Fed. R. 71.

⁷ American Cable Ry. Co. v. Mayor, &c. of the City of N. Y., 43 Fed. R. 60.

⁸ Stonemetz P. M. Co. v. Brown F. M. Co., 46 Fed. R. 72.

tenders the entire grant to the inspection of the court and party.⁹ When *profert* of the patent is made in the bill, only its title need be set forth.¹⁰ It was held at circuit that in a bill founded upon a reissued patent it is not necessary to cover specifically the ground upon which the original patent was surrendered; ¹¹ but if such a bill shows a delay of more than two years in obtaining the reissue, it should set up an excuse for the delay.¹² Upon a demurrer for both uncertainty and want of equity to a bill founded upon a reissued patent, when the only allegations concerning the reissue were "that said Charles T. Day, having for good and lawful cause and with the consent and approbation of your orator, surrendered said letters-patent to the commissioner of patents, and having made due application therefor, and having in all things complied with the acts of Congress in such case made and provided, did, on the eighteenth of February, 1879, obtain new letters-patent, being reissued letters-patent, for the same invention for the residue of said term, and which were marked 'reissue, No. 8,590,' and were issued in due form of law to your orator, as assignee, under the seal of the patent office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents, and bearing date the day and year aforesaid, as by the last mentioned reissued letters-patent, ready here in court to be produced, will appear;" it was held that the bill was not objectionable.¹³ The court then said: "It is not necessary to aver, specifically, the ground on which the original patent was surrendered. The reissue of letters-patent by the Commissioner is *prima facie* evidence that such reissue is founded on sufficient cause, and is in accordance with law. It is also presumed until the contrary is shown that the Commissioner acted within his statutory authority."¹⁴ A bill founded upon a reissued patent, which shows a delay of more than two years in the application for the reissue, must allege sufficient excuse for the delay.¹⁵ So must a bill to compel the issue of a patent which shows a delay of two years in prosecuting the application in the Patent Office.¹⁶

⁹ *Wilder v. McCormick*, 2 Blatchf. 31, 35.

¹⁰ *M'Millin v. St. Louis & Mississippi Valley Transportation Co.*, 18 Fed. R. 260.

¹¹ *Spaeth v. Barney*, 22 Fed. R. 828.

¹² *Wollensak v. Reiher*, 115 U. S. 96.

¹³ *Spaeth v. Barney*, 22 Fed. R. 828.

For a precedent of a bill for the infringement of an original patent, see *McCoy v. Nelson*, 121 U. S. 484.

¹⁴ *Colt, J.*, in *Spaeth v. Barney*, 22 Fed. R. 828, 829.

¹⁵ *Wollensak v. Reiher*, 115 U. S. 96.

¹⁶ *Gandy v. Marble*, 122 U. S. 432.

It has been held that a simple averment that the defendant has infringed the patents above described is sufficient.¹⁷ A bill to enjoin the infringement of a patent by the use of a machine need not state what articles the defendant has made by the use of the machine.¹⁸ An allegation that the defendant "since the date of said patent" had infringed, was held upon demurrer not to signify "ever since," but "after or subsequently to" that date.¹⁹ A bill to enjoin the infringement of several distinct patents has been held multifarious;²⁰ but if all the patents are infringed in the use of or manufacture of a single machine and it is so alleged, the bill is good.²¹ It has been said that the complainant "should aver that said inventions are capable of conjoint as well as separate use, and are so used by the defendants."²² A charge of infringement, and a prayer for an injunction and accounting accordingly, may be joined with a charge of interference and a prayer for relief, under § 4918 of the Revised Statutes.²³ A bill seeking an injunction with damages against the infringement of a patent, and an injunction with damages against the publication of libellous circulars affecting plaintiff's patent, has been held multifarious.²⁴ Persons who are acting in concert as employees of the same corporation in the infringement of a patent may be joined as defendants to the same bill.²⁵ An objection that defendants were improperly joined should be raised by demurrer when it appears on the face of the bill.²⁶

§ 78. **General Rules of Equity Pleading.** — Otherwise, the rules regulating the framing of a bill and, with the exceptions subsequently given, other pleadings in equity are substantially the

¹⁷ *American Bell Tel. Co. v. Southern Tel. Co.*, 34 Fed. R. 803. See also *McMillin v. St. Louis & Mississippi Valley Transportation Co.*, 18 Fed. R. 260; *McCoy v. Nelson*, 121 U. S. 484; *Cleveland F. & B. Co. v. U. S. Rolling Stock Co.*, 41 Fed. R. 476.

¹⁸ *Fischer v. Hayes*, 6 Fed. R. 76, 78.

¹⁹ *Brush Electric Co. v. Ball Electric Light Co.*, 43 Fed. R. 899.

²⁰ *Hayes v. Dayton*, 8 Fed. R. 702; *Shickle v. South St. Louis Foundry Co.*, 22 Fed. R. 105.

²¹ *Nourse v. Allen*, 4 Blatchf. C. C. 376; *Perry v. Corning*, 7 Blatchf. C. C. 195; *Case v. Redfield*, 4 McLean, 526; *Game-well Fire Alarm Telegraph Co. v. City of*

Chillicothe, 7 Fed. R. 351; *Nellis v. McLanahan*, 6 Fisher's Pat. Cas. 286.

²² *Gamewell Fire Alarm Telegraph Co. v. City of Chillicothe*, 7 Fed. R. 351; *Nellis v. McLanahan*, 6 Fisher's Pat. Cas. 286.

²³ *Leach v. Chandler*, 18 Fed. R. 262; *Holliday v. Pickhardt*, 29 Fed. R. 853; *Swift v. Jenks*, 29 Fed. R. 642; *American Roll Paper Co. v. Knopp*, 44 Fed. R. 609, 612; *Stonemetz P. M. Co. v. Brown F. M. Co.*, 46 Fed. R. 72.

²⁴ *Fougeres v. Murbarger*, 44 Fed. R. 292. See § 74.

²⁵ *Poppenhusen v. Falke*, 4 Blatchf. 493.

²⁶ *Putnam v. Hollander*, 6 Fed. R. 882. See §§ 75, 110.

same as those of pleading at common law ; but more liberality is used in their construction,¹ and the use of technical expressions is never necessary.² An allegation that the plaintiff is seized in fee simple is equivalent to an allegation that he is in possession.³ If the plaintiff claim under a derivative title, he must show the steps by which it has come into existence.⁴ Where, however, there is an existing privity between the plaintiff and defendant, independently of the plaintiff's title, which gives the plaintiff a right to maintain the suit ; as, for example, if they are landlord and tenant, or mortgagor and mortgagee, then it is not necessary to state the plaintiff's title fully in the bill.⁵ An allegation that the complainant acquired the title by purchase from the assignee in bankruptcy of the original owner was held sufficient, although it did not state that the assignee in bankruptcy obtained an order from the court authorizing him to make the sale.⁶ It was said recently at circuit, that in a suit to remove a cloud from the title of land generally, "it will be found sufficient for the plaintiff to allege his possession, and interest or estate in the land, or that he is the owner thereof in fee for life or for years, and that he claims the same by a regular chain of conveyances from some recognized and undisputed source of title, as, the United States, or its donee under the donation act of September 27, 1850, without setting out such conveyances or stating them in detail. But when there is reason to believe, as in this case and many others, that the rightfulness of the defendant's claim depends on the validity or legal effect of some link or links in the conveyances under which the plaintiff claims title, it is very convenient, if not necessary, that the statement of the plaintiff's case should contain the facts fully and in detail at that point in the chain of his title where it conflicts with the claim of the defendant. By so doing the necessity of future amendments will be avoided, and the progress and dispatch of the case promoted."⁷ And a demurrer to a bill for a lack of certainty in this respect has been sustained.⁸ "It is not

§ 78. ¹ Daniell's Ch. Pr. (2d Am. ed.) 413.

⁵ Daniell's Ch. Pr. (2d Am. ed.) 370, 371.

² Daniell's Ch. Pr. (2d Am. ed.) 414.

⁶ *Amory v. Lawrence*, 3 Cliff. 523.

³ *Gage v. Kaufman*, 133 U. S. 471.

⁷ *Goldsmith v. Gilliland*, 22 Fed. R.

⁴ *Lord Digby v. Meech*, Bunb. 195 ;

865, 868.

Humphreys v. Tate, 4 Fredell's Eq. (N. C.).

⁸ *Goldsmith v. Gilliland*, 22 Fed. R.

220 ; *Marshall v. Turnbull*, 34 Fed. R. 827 ;

865.

Daniell's Ch. Pr. (2d Am. ed.) 369, 370.

necessary, when all the legal and equitable owners are joined, to state the formalities or the mode of conveyance by which the equitable interests became vested in the co-complainants.”⁹ In a bill filed by an executor or an administrator, it seems to be sufficient to state that the will has been proved, or letters of administration taken out, “in the proper court,” without naming it.¹⁰ If, however, the plaintiff undertake to name the court, and it be an improper or insufficient one, the bill is demurrable.¹¹ If the plaintiff’s title would be incomplete without the performance of some preliminary act, its performance must be alleged, and a mere statement that the title is complete is insufficient.¹² Thus, in an English case, where the plaintiff sued as a shareholder of a joint-stock company, and merely alleged in his bill “that he purchased for valuable considerations divers shares, upon which the instalment of five per cent had been paid, and that he ever since has been, and now is, the holder of such shares;” while in another part of the bill it was alleged “that by the rules of the association, as set forth in the prospectus, no transfer of shares would be valid in law or equity, unless the purchaser was approved by a board of directors, and signed an instrument binding him to observe the regulations,” — it was held, on demurrer, that such action on the part of the board and the purchaser was a condition precedent to the transfer of the title to a share of stock; and that the bill was defective for not alleging such action.¹³ So, a complainant who rests his title upon a tax-deed must plead the performance of the prerequisites to the validity of the deed.¹⁴ When the nature of the conveyance through which the plaintiff claims is such that by common law independent of a statute, as the statute of frauds, for example, no deed, writing, or other formality was essential to its validity, the English rule was that compliance with such formality need not be alleged.¹⁵ In this respect, equity followed the rule at common law, that such statutory regulations did not alter the form of pleadings.¹⁶ If, however, it appeared

⁹ *Shipman J.*, in *Black v. Henry G. Allen Co.*, 42 Fed. R. 618, 623.

¹⁰ *Humphreys v. Ingledon*, 1 P. Wms. 752; *Black v. Henry G. Allen Co.*, 42 Fed. R. 618, 623.

¹¹ *Tourton v. Flower*, 3 P. Wms. 369; *Black v. Henry G. Allen Co.*, 42 Fed. R. 618, 624; *Daniell’s Ch. Pr.* (2d Am. ed.) 364.

¹² *Walburn v. Ingilby*, 1 M. & K. 61; *Daniell’s Ch. Pr.* (2d Am. ed.) 369; *Story’s Eq. Pl.* §§ 257, 257 a, 258.

¹³ *Walburn v. Ingilby*, 1 M. & K. 61.

¹⁴ *Greenwalt v. Duncan*, 16 Fed. R. 35.

¹⁵ *Daniell’s Ch. Pr.* (2d Am. ed.) 416; *Harrison v. Hogg*, 2 Ves. Jr. 327.

¹⁶ *Daniell’s Ch. Pr.* (2d Am. ed.) 416, 417; *Stephen on Pleading*, 313.

upon the face of the bill that compliance had not been made with such a formality, the bill was demurrable upon that ground.¹⁷ When, however, a right had been originally created by statute, as a right to land by devise, or in this country a patent or copyright, a compliance with the statutory requirements had to be alleged by one claiming under it.¹⁸

"The rule in equity is that it is not sufficient to charge a fraud simply, but you must charge also some injury as the result of the fraud."¹⁹ Where a bill shows apparent laches, it should set forth the impediments to an earlier suit, the cause of the complainant's previous ignorance, if any, of his rights, and when he first knew of them.²⁰ The same rule is applied to a bill upon a reissued patent showing a delay of more than two years in the application for a reissue;²¹ and to a bill to compel the issue of a patent which shows a delay of two years in prosecuting the application in the Patent Office.²² In construing this, as well as all other parts of pleadings, every doubt is against the pleader;²³ but contracts by corporations are presumed to be within their charters until the contrary is shown.²⁴ When the bill contains general and specific allegations as to the same matter, the general allegations will be referred to those which are specific.²⁵ Exhibits attached to the bill, and therein referred to, are considered as a part of the same.²⁶

§ 79. **The Common Confederacy Clause.** — The confederacy part, which came next in order, is now expressly declared unnecessary by the equity rules.¹ It is still, however, inserted by some practitioners. The old form was substantially as follows: "But now it is, may it please your honor, that the said A. B., combining and confederating with divers persons," or, if there are several defendants, "combining and confederating with the said C. D. and E. F., and with divers other persons, . . . at present unknown to your orator, whose names when discovered your orator

¹⁷ *Randall v. Howard*, 2 Black, 585, 589; *Daniell's Ch. Pr.* (2d Am. ed.) 417; *Redding v. Wilkes*, 3 Brown C. C. 401.

¹⁸ *Daniell's Ch. Pr.* (2d Am. ed.) 419; *Sullivan v. Redfield*, 1 Paine, 441; *Atwill v. Ferrett*, 2 Blatch. C. C. 39.

¹⁹ *Linn v. Green*, 17 Fed. R. 407.

²⁰ *Badger v. Badger*, 2 Wall. 87; *Richards v. Mackall*, 124 U. S. 183; *Gandy v. Marble*, 122 U. S. 432; *Wollensak v. Reiher*, 115 U. S. 96.

²¹ *Wollensak v. Reiher*, 115 U. S. 96.

²² *Gandy v. Marble*, 122 U. S. 432.

²³ *Phelps v. McDonald*, 99 U. S. 298, 305.

²⁴ *Express Co. v. Railroad Co.*, 99 U. S. 191, at page 199.

²⁵ *Ellis v. Colman*, 25 Beav. 662; *Story's Eq. Pl.* § 37 a.

²⁶ *Black v. Henry G. Allen Co.*, 42 Fed. R. 618, 625; *infra*, § 106.

§ 79. ¹ Rule 21.

prays he may be at liberty to insert herein, with apt words to charge them as the parties defendant hereto, and, contriving how to wrong and injure your orator in the premises, he the said A. B. at times pretends that.”² “This practice is said to have arisen from the idea that without such a charge parties could not be added to the bill by amendment, and in some cases, perhaps, the charge has been inserted with a view to give the court jurisdiction.”³ It is mere surplusage, and being a conclusion of law when inserted need not be answered.⁴

§ 80. **The Charging Part.** — Next followed formerly the charging part of the bill, which also has been declared unnecessary by the equity rules,¹ but is occasionally used. “It usually consists of some allegation or allegations which set forth the matters of defense or excuse which it is supposed the defendant intends or pretends to set up to justify his non-compliance with the plaintiff’s right or claim, and then charges other matters, which disprove or avoid the supposed defense or excuse. It is sometimes also used for the purpose of obtaining a discovery of the nature of the defendant’s case, or to put in issue some matter which it is not for the interest of the plaintiff to admit; for which purpose the charge of the pretence of the defendant is held to be sufficient.”² If such averments are considered necessary now, the proper method of pleading is to include them in the narrative part of the bill.³

§ 81. **The Jurisdiction Clause.** — Then came the jurisdiction clause. This ran substantially as follows: “All which actings, doings, and pretences of the said confederates are contrary to equity and good conscience, and tend to the manifest wrong, injury, and oppression of your orator in the premises. In tender consideration whereof, and forasmuch as your orator is entirely remediless by the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable; to the end, therefore,”¹ &c. It is still the common usage to insert a short clause of this character, although it has been declared by the equity rules unnecessary.²

² Story’s Eq. Pl. § 29, note 2.

³ Mitford’s Pl. ch. 1, § 2.

⁴ Story’s Eq. Pl. § 29.

§ 80. ¹ Rule 21.

² Story’s Eq. Pl. § 31. See Mitford’s Pl. ch. 1, § 3.

³ Rule 21; *Partridge v. Haycraft*, 11 Ves. 574. See § 67.

§ 81. ¹ Story’s Eq. Pl. § 34, and notes.

² Rule 21.

§ 82. **The Interrogatory Clause.** — The interrogatory clause which followed was of much more importance formerly, when parties to a suit could not testify in actions at common law, than it is at the present time. Yet, in addition to the inclusion in the prayer for relief of a request that the defendants be compelled to answer the bill, it is still not unusual to require them to answer specific interrogatories. The equity rules provide as follows: "The interrogatories contained in the interrogating part of the bill must be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, &c.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form to the effect following, that is to say: 'The defendant (A. B.) is required to answer the interrogatories numbered respectively 1, 2, 3, &c.'" ¹ The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill; and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment to the bill." ² "Instead of the words of the bill now in use preceding the interrogatory part thereof, ³ and beginning with the words 'to the end therefore,' there shall hereafter be used words in the form or to the effect following: 'To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several corporate oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to each of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say, —

§ 82. ¹ Rule 41.

² Rule 42.

³ The old form was as follows: "To the end, therefore, that the said A. B. and the rest of the confederates, when discovered, may upon their several and respective corporate oaths, full, true, direct, and perfect answer make, to all and singular the matters hereinbefore stated and charged, as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interro-

gated; and that not only to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay, and belief; and more especially that they may answer and set forth whether, &c.; or they may set forth and discover whether they do not know, have heard, or are informed, and in their conscience believe that," &c. Story's Eq. Pl. § 35, note 2.

“ ‘ Whether, &c.

“ ‘ Whether, &c.’ ” ⁴

No interrogatory need be answered or will be sustained which does not refer to some matter alleged in the narrative part of the bill,⁵ but a number of interrogatories may be founded upon a single allegation.⁶ The criterion of immateriality of interrogatories is not whether an affirmative answer will prove an allegation in a bill, but whether it will tend to prove the bill.⁷ The defendant need not answer an interrogatory if by so doing he would subject himself to a penalty, or a forfeiture, or to punishment for a crime.⁸ When there are no specific interrogatories the defendants are still bound to answer, either admitting or denying every part of the bill, as if they had been specifically interrogated thereabout.⁹ An answer under oath to the whole of the bill, or to all but certain specified interrogatories, may be expressly waived by the plaintiff.¹⁰ Such waiver is usually inserted in the prayer for relief or for process.

§ 83. **The Prayer for Relief.** — “ The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief. And if an injunction, or a writ of *ne exeat regno*, or any other special order pending the suit is required, it shall also be specially asked for.” ¹ Under the prayer for general relief the court will usually grant any relief ² other than an interlocutory order, which is consistent with, and a ground for which is included in, the allegations of the bill,³ and not inconsistent with the prayer for special relief.⁴

⁴ Rule 43. For an excellent statement of the reasons for the use of specific interrogatories, see Report of Chancery Commissioners, 9th March, 1826, Appendix, pp. 1, 2; Story's Eq. Pl. § 38, note 3.

⁵ Attorney-General v. Whorwood, 1 Ves. 534; Daniell's Ch. Pr. (2d Am. ed.) 432, 433.

⁶ Faulder v. Stuart, 11 Ves. 296; Bullock v. Richardson, 11 Ves. 375; Story's Eq. Pl. § 37.

⁷ Uhlmann v. Arnholt & Schaeffer Brewing Co., 41 Fed. R. 369.

⁸ Stewart v. Drasha, 4 McLean, 563; Atwill v. Ferrett, 2 Blatchf. C. C. 39; United States v. White, 17 Fed. R. 561, 565.

⁹ Amendment of 1850 to Rule 40.

¹⁰ Amendment of 1851 to Rule 41.

§ 83. ¹ Rule 21. Compare Bloomfield v. Eyre, 8 Beav. 250, 259.

² Tayloe v. Merchants' Fire Ins. Co., 9 How. 390; Stewart v. Chesapeake & Ohio Canal Co., 1 Fed. R. 361; County of Mobile v. Kimball, 102 U. S. 691; Chicago, St. L. & N. O. R. R. Co. v. Maccomb, 2 Fed. R. 18; Adams v. Kehlor Milling Co., 36 Fed. R. 212.

³ English v. Foxall, 2 Pet. 595; Curry v. Lloyd, 22 Fed. R. 258, 265; Mackall v. Casilear, 137 U. S. 556, 564.

⁴ Hiern v. Mill, 13 Ves. 118; Soden v. Soden, there cited; Grimes v. French, 2 Atk. 141; Curry v. Lloyd, 22 Fed. R. 258, 265.

It seems that if there be no objection to the specific relief prayed for, the plaintiff cannot at the hearing abandon that and obtain a decree for different relief.⁵ It has been held in England that, in some cases of fraud, where no other relief can be given against a party deeply involved in the fraud charged by the bill, the payment of the costs of the suit by that party ought to form the subject of a specific prayer, and that otherwise his demurrer to the bill will be sustained.⁶ In a case where the bill contained allegations showing threatened injury to rights of property, not however mentioned as an independent ground of relief, while it was mainly occupied with complaints of a threatened invasion of rights of a political nature, as the specific prayers for relief were confined to the protection of the political rights, although the bill contained a general prayer for relief, the court refused to consider the allegations concerning the threatened injury to property.⁷ A bill may, however, pray relief in the alternative, when it is said to have a double aspect.⁸ The prayer for general relief, Mr. Robbins, "an eminent counsel," used to say, was "the best prayer after the Lord's Prayer."⁹ It is usually in one of the two following forms: "And that your orator shall have such other or further, or other and further, relief in the premises as to this court shall seem meet;" or, "that your orator may be further and otherwise relieved in the premises according to equity and good conscience." If a different state of facts, under which the complainant is entitled to relief, appears upon the hearing, the court may allow the case to stand over, and give the plaintiff leave to amend his bill in conformity with them, and then obtain relief.¹⁰ And if the complainant be an infant or the representative of a charity, it would formerly grant relief without regard to the allegations in the bill.¹¹

§ 84. **Waivers and Offers.**—It is customary to insert in the prayer for relief any waiver or offer which the plaintiff desires to

⁵ *Allen v. Coffman*, 1 Bibb (Ky.), 469; *Pillow v. Pillow*, 5 Yerg. (Tenn.), 420.

⁶ *Le Texier v. The Margravine of Anspach*, 15 Ves. 159, 164; *Daniell's Ch. Pr.* (2d Am. ed.) 441.

⁷ *Georgia v. Stanton*, 6 Wall. 50.

⁸ *Shields v. Barrow*, 17 How. 130, 144; *Kilgour v. New Orleans Gas-Light Co.*, 2 Woods, 144, 148; *Gaines v. Chew*, 2 How. 619, 643. See § 70.

⁹ *Manaton v. Molesworth*, 1 Eden, 26, note b; *Dormer v. Fortescue*, 3 Atk. 124; *Story's Eq. Pl.* § 41, n. 1.

¹⁰ *Beaumont v. Boulthbee*, 5 Ves. 485; *Palk v. Lord Clinton*, 12 Ves. 63; *Daniell's Ch. Pr.* (2d Am. ed.) 439, 440.

¹¹ *Stapilton v. Stapilton*, 1 Atk. 2; *Attorney-General v. Jeanes*, 1 Atk. 355; *Story's Eq. Pl.* § 40, note.

make;¹ although there is no reason why that should not be set forth in the narrative part of the bill. "If the complainant in his bill shall waive an answer in the oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause. But this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the Act of Congress of July 2, 1864."² It rarely happens that advantage of this rule is not taken by a waiver inserted here, or more frequently in the prayer of process, in order to avoid the rule, that otherwise an allegation responsive to the bill in a sworn answer is presumed to be true, unless rebutted by the testimony of two witnesses, or one witness and strong corroborating circumstances.³ In accordance with the maxim that he who seeks equity must do equity, a court of equity often refuses relief to one seeking its aid, unless upon condition that he shall do what it considers equitable to the defendant, or sometimes even to a third person.⁴ In some cases it enforces this by the entry of a conditional decree without reference to the pleadings.⁵ But its more usual practice is to insist that the plaintiff shall offer to perform, or, in some cases, allege the performance of, the equitable act that it requires of him in his bill, which otherwise will be demurrable. Thus, a bill to cancel securities claimed to be usurious, or otherwise rendered void by a statute, must contain an offer by the plaintiff to pay the defendant the money he has received therefor with lawful interest.⁶ And it seems that a State statute abolishing this rule of equity will not be followed by a United States court, though the suit concerns securities made in such State, at least not when the court is held in another State.⁷ So a bill to redeem a mort-

§ 84. ¹ Daniell's Ch. Pr. (2d Am. ed.) 443.

² Amendment of 1871 to Rule 41.

³ Vigel v. Hopp, 104 U. S. 441.

⁴ Fosdick v. Schall, 99 U. S. 235.

⁵ Walden v. Bodley, 14 Pet. 156, 164, 165.

⁶ Mason v. Gardiner, 4 Brown C. C.

436; Tupper v. Powell, 1 J. Ch. (N. Y.)

439; Daniell's Ch. Pr. (2d Am. ed.) 443.

⁷ Matthews v. Warner, 6 Fed. R. 461;

s. c. affirmed upon another point, 112 U. S. 600.

gage must contain an offer to pay what is due thereon, though the particular sum need not be specified.⁸ A bill to set aside a judicial sale as void must be accompanied by a tender or offer of the purchase-money with interest, provided it was applied for the benefit of the estate, unless that money has been first repaid, which the court might require to be done before the bill is filed.⁹ It seems that a bill to set aside a foreclosure of a railway mortgage should contain an offer of payment of the amount admitted to be due under the mortgage, and of the costs of the foreclosure suit, or at least show some reason why such an offer should not be required.¹⁰ A bill to set aside a tax sale must ordinarily contain an order to repay the purchaser at least all legal taxes on the property paid by him, both those for which the property was sold, and those subsequently levied thereon and paid by him, with interest upon each sum.¹¹ A bill to restrain the collection of State taxes must be preceded by payment of "what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted."¹² If the whole tax is claimed to be void as improperly assessed, it seems that the complainant must tender the amount he would owe if a proper assessment had been made.¹³ If the proper officer refuses to receive a part of the tax, it must be tendered without the condition annexed of a receipt in full.¹⁴ A bill to compel the specific performance of a contract by a defendant should, it seems, contain an offer by the plaintiff to perform his part thereof.¹⁵ And formerly it was,¹⁶ but no longer is,¹⁷ required that a bill for an account should contain an offer on the part of the plaintiff to pay the balance, if any, found due against him. But a bill filed by the United States to vacate a patent for public

⁸ Story's Eq. Pl. § 187 a; *Harding v. Pingey*, 10 Jurist n.s. 872; *Perry v. Carr*, 41 N. H. 371; *Robinson v. Iron Railway Co.*, 135 U. S. 522.

⁹ *Davis v. Gaines*, 104 U. S. 386.

¹⁰ *Carey v. Houston & T. C. Ry. Co.*, 45 Fed. R. 438, 443.

¹¹ *Gage v. Pumpelly*, 115 U. S. 454. But see *Mendenhall v. Hall*, 134 U. S. 559, 569.

¹² *State Railroad Tax Cases*, 92 U. S. 575, 617.

¹³ *State Railroad Tax Cases*, 92 U. S.

575, 617; *National Bank v. Kimball*, 103 U. S. 732.

¹⁴ *State Railroad Tax Cases*, 92 U. S. 575, 617; *National Bank v. Kimball*, 103 U. S. 732.

¹⁵ *Daniell's Ch. Pr.* (2d Am. ed.) 442; *Stapylton v. Scott*, 13 Ves. 425; *Fife v. Clayton*, 13 Ves. 546.

¹⁶ *Godbolt v. Watts*, 2 Anst. 543; *Daniell's Ch. Pr.* 442.

¹⁷ *Colombian Government v. Rothschild*, 1 Simons, 94, 103; *Wells v. Strange*, 5 Ga. 22.

lands as obtained by fraud, need not contain an offer to return the money paid therefor by the fraudulent patentee.¹⁸ Nor need a bill to obtain relief against an infringement of a copyright contain a waiver of the complainant's statutory right to a forfeiture of the piratical plates.¹⁹ It is, however, a rule in equity, that no person will be compelled to discover that which may expose him to a penalty or forfeiture.²⁰ A discovery of such matters can only be compelled when the complainant is the only person who can enforce the penalty or forfeiture, and he is willing to waive it,²¹ as, for example, in a case of infringement of copyright.²² An omission of a waiver, tender, or offer, whenever considered necessary, is a ground for demurrer;²³ but leave to amend is in such cases usually given. And in many, but not all cases,²⁴ when no actual tender is required, a general offer to do whatever equity requires in the premises seems to be sufficient. In some cases the court will give relief by a conditional decree imposing terms upon the complainant, although no offer is contained in his bill.²⁵

§ 85. **The Prayer of Process.**—The prayer of process usually requests the issue of a subpoena to compel the defendants to appear and answer and abide the judgment of the court. "The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon as justice may require, upon the return of the process. If an injunction or a writ of *ne exeat regno*, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process."¹ "The plaintiff may complain

¹⁸ *United States v. Minor*, 114 U. S. 233; *United States v. Trinidad Coal & Coke Co.*, 137 U. S. 160. See also *Moffat v. United States*, 112 U. S. 24; *United States v. White*, 17 Fed. R. 561, 565; *United States v. Pratt Coal & Coke Co.*, 18 Fed. R. 708.

¹⁹ *Farmer v. Calvert Lithographing Co.*, 1 Flippin, 228.

²⁰ *Stewart v. Drasha*, 4 McLean, 563; *Atwill v. Ferrett*, 2 Blatchf. 39; *United States v. White*, 17 Fed. R. 561, 565.

²¹ *Lord Uxbridge v. Staveland*, 1 Ves. Sen. 56; *Atwill v. Ferrett*, 2 Blatchf. 39.

²² *Atwill v. Ferrett*, 2 Blatchf. 39; *Farmer v. Calvert Lithographing Co.*, 1 Flippin, 228, 233.

²³ *United States v. Pratt Coal & Coke Co.*, 18 Fed. R. 708.

²⁴ *State Railroad Tax Cases*, 92 U. S. 575, 617.

²⁵ *Walden v. Bodley*, 14 Pet. 156, 164, 165.

§ 85. ¹ Rule 23. *Segee v. Thomas*, 3

and tell stories of whom he pleases, but they only are defendants against whom process is prayed.”² It has, however, been held that the omission in the prayer of process of the name of a defendant otherwise sufficiently described in the bill is waived by his general appearance, and that no other defendant can take advantage of the defect.³ If a party is sought to be sued in both his individual and a representative capacity, process should be asked against him in both capacities. Otherwise, it seems, that he would be held to be a party only in that capacity in which he was therein referred to, even though in the subpœna and in the introduction to the bill he were named as a defendant in both capacities.⁴ If process be prayed against a defendant in a representative capacity and the subpœna be issued against him generally, the bill is not demurrable.⁵ The proper remedy is a motion to set aside the subpœna. A bill without a prayer of process is demurrable.⁶

§ 86. **The Signature to a Bill.** — “Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the instructions given to him and the case laid before him, there is good ground for the suit in the manner in which it is framed.”¹ This practice began, it is said, in the time of Sir Thomas More.² Before that time it was the practice for a master in chancery to examine the bill and determine whether it was better to dismiss it originally or retain it by subpœna.³ A signature upon the back of the bill has been held to be sufficient.⁴ The remedy for a defect in this respect is by a motion to take the bill off the file,⁵ or by demurrer.⁶ The court may of its own motion order the bill taken off the file.⁷ Leave to amend by adding the signature is always granted.⁸ If the defendant should answer without taking the

Blatchf. C. C. 11; *Buerk v. Imhaeuser*, 8 Fed. R. 457.

² Lord Chancellor Parker in *Fawkes v. Pratt*, 1 P. Wms. 593.

³ *Buerk v. Imhaeuser*, 8 Fed. R. 457.

⁴ *Carter v. Ingraham*, 43 Ala. 78. But see *Brasher v. Van Cortlandt*, 2 J. Ch. (N. Y.) 247.

⁵ *Walton v. Herbert*, 3 Green, Ch. (N. J.) 73.

⁶ *Elmendorf v. Delancey*, 1 Hopkins (N. Y.), 555.

§ 86. ¹ Rule 24.

² 1 Hargrave's Law Tracts, 302; Daniell's Ch. Pr. (2d Am. ed.) 357.

³ 1 Hargrave's Law Tracts, 302; Daniell's Ch. Pr. (2d Am. ed.) 357.

⁴ *Dwight v. Humphreys*, 3 McLean, 104.

⁵ *Dillon v. Francis*, 1 Dickens, 68.

⁶ *Kirkley v. Burton*, 5 Madd. 378; *Dwight v. Humphreys*, 3 McLean, 104.

⁷ *French v. Dear*, 5 Ves. 547.

⁸ *Kirkley v. Burton*, 5 Madd. 378; *Dwight v. Humphreys*, 3 McLean, 104.

objection, such a defect would probably be held waived.⁹ If the complainant sued in person, the signature of counsel would probably be dispensed with.¹⁰ A bill is also usually signed by the solicitor, who may be the same person as the counsel, but need not be signed by the plaintiff unless he sue in person.

§ 87. **Affidavits to Bills.**—An affidavit must be annexed to the bill in the following cases and no others, although a superfluous affidavit will not make the bill bad: A bill to obtain the benefit of an instrument upon which an action at law would lie, were it not either lost or out of the possession of the complainant and believed to be in that of the defendant, must be supported by an affidavit of those facts which are necessary to give the court jurisdiction.¹ A bill to perpetuate the testimony of witnesses, or to take testimony *de bene esse*, must be supported by an affidavit stating the reasons which render such a proceeding necessary.² A bill of interpleader, and perhaps also a bill in the nature of an interpleader, should be supported by an affidavit by the plaintiff that he does not collude with either of the defendants;³ or if the plaintiff be a corporation, by one of its officers, that, to the best of his knowledge and belief, the plaintiff does not so collude.⁴ “Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified under oath.”⁵ Every bill which it is desired to use in support of a motion for a stay order, special injunction, substituted service, or other interlocutory application, other than one for a common injunction, must be accompanied by an affidavit verifying the bill itself or the substance of its allegations;⁶ but the affidavit need not be filed with the bill, nor before the notice of a motion for the interlocutory relief, and its omission does not make the bill demurrable.⁷ In the first three instances, where an affidavit is required, the defendant can only

⁹ See U. S. R. S. § 954.

¹⁰ See U. S. R. S. § 747; 1 Hoffman's Ch. Pr. 97.

§ 87. ¹ Walmsley v. Child, 1 Ves. Sen. 343; Whitfield v. Fausset, 1 Ves. Sen. 392; Story's Eq. Pl. §§ 313, 477; Daniell's Ch. Pr. (2d Am. ed.) 449, 450.

² Philips v. Carew, 1 P. Wms. 117; Daniell's Ch. Pr. (2d Am. ed.) 452.

³ Metcalf v. Hervey, 1 Ves. Sen. 248.

⁴ Bignold v. Audland, 11 Simons, 23.

⁵ Rule 94. See §§ 12, 76, 87, 207.

⁶ See chapter XV.

⁷ Hughes v. Northern Pac. Ry. Co., 18 Fed. R. 106, 110; Black v. Henry E. Allen Co., 42 Fed. R. 618, 622.

take advantage of the defect by demurrer.⁸ By plea or answer the omission will be waived.⁹

§ 88. *Bills of Interpleader.* — A bill of interpleader is a petition filed by a disinterested person holding a fund or thing to which two or more who are made defendants set up conflicting claims, between whom he cannot decide without incurring the risk, if he delivers the property to one, of being finally obliged to pay the other damages for having done so.¹ It can only be filed by one who claims no interest in the property in question, and who seeks no other relief than leave to deposit it in the care of the court, and be relieved from all danger of further vexation concerning the same.² The conflicting claims must be doubtful.³ The claimants must seek the same thing, not merely the same amounts under different contracts.⁴ A tenant or agent may not, by filing such a bill, dispute the title of his lessor or principal when a demand is made upon him by a stranger claiming under title paramount.⁵ He may, however, thus obtain relief when different persons claim under assignments from the person to whom he first owed the debt.⁶ A bill of interpleader may be filed before or after proceedings at law have been begun against the complainant;⁷ but no injunction can be granted to restrain a proceeding already begun in a State court;⁸ nor, according to the English rule, to stay proceedings in ejectment in any court.⁹ If a suit in equity have been already begun against the stakeholder, he might perhaps obtain relief by a petition therein;¹⁰ but the more prudent course is for him to file a new bill.¹¹ The fact that one of the conflicting claims is actionable at law and the other is purely equitable, will not deprive him of relief.¹² The

⁸ Findlay v. Hinde, 1 Pet. 241, 244; Crosse v. Bedingfield, 12 Simons, 35; Daniell's Ch. Pr. (2d Am. ed.) 453.

⁹ Findlay v. Hinde, 1 Pet. 241, 244; Crosse v. Bedingfield, 12 Simons, 35.

§ 88. ¹ Mitford's Eq. Pl. ch. 1; Story's Eq. Pl. §§ 291-297; Daniell's Ch. Pr. (2d Am. ed.) ch. xxxii.

² Killian v. Ebbinhaus, 110 U. S. 568; Langston v. Boylston, 2 Ves. Jr. 101; Mohawk & Hudson R. R. Co. v. Clute, 4 Paige (N. Y.), 384.

³ Shaw v. Coster, 8 Paige (N. Y.), 339; Cochrane v. O'Brien, 2 Jones & La T. 380; Story's Eq. Pl. § 292.

⁴ Hoggart v. Cutts, 1 Cr. & Ph. 197; Story's Eq. Pl. § 293.

⁵ Dungey v. Angove, 2 Ves. Jr. 304, 310; Lowe v. Richardson, 3 Madd. 277; Story's Eq. Pl. § 295.

⁶ Cowtan v. Williams, 9 Ves. 107; Clarke v. Byne, 13 Ves. 386; Hoggart v. Cutts, 1 Cr. & Ph. 197, 205.

⁷ Richards v. Salter, 6 J. Ch. (N. Y.) 445.

⁸ U. S. R. S. § 720.

⁹ Metcalf v. Hervey, 1 Ves. Sen. 248.

¹⁰ Badeau v. Rogers, 2 Paige (N. Y.), 209.

¹¹ Birch v. Corbin, 1 Cox Eq. 144.

¹² Richards v. Salter, 6 J. Ch. (N. Y.) 445.

enactment of a State statute giving similar relief upon motion by the defendant to an action at law, does not deprive equity of its original jurisdiction.¹³ The most common kind of interpleader suits at the present time are those brought by insurance companies against conflicting claimants to the proceeds of policies issued by them.¹⁴ A bill of interpleader should state the manner in which the plaintiff obtained possession of the property in question, and admit that he has no interest therein. It should set forth the claims of the defendants, showing that they conflict, and that he is ignorant of their respective rights, and cannot determine between them without hazard to himself. It should offer to deposit the fund or other property in the custody of the court; and conclude with a prayer that upon such deposit the defendants may be enjoined from further molesting him about the matter in question; that they be required to interplead and settle their respective rights among themselves; and that he may have his costs out of the fund, if there be one, otherwise from the defendants.¹⁵ The bill must be accompanied by an affidavit; which, when filed by a natural person, should be sworn to by him, and state that "this bill is not filed in collusion with either of the defendants named, but merely of his own accord for relief in this Honorable Court."¹⁶ If a corporation be the complainant, one of its officers should make the affidavit, swearing that, to the best of his knowledge and belief, the corporation does not collude with either of the defendants.¹⁷ The omission of the affidavit is a ground for a demurrer.¹⁸ The bill should also conform to the provisions of the rules regulating original bills. No other step can be taken in the cause until after deposit in court of the fund or other property in dispute.¹⁹ It has, however, been held in England that a bill is not demurrable for the omission of an offer so to do.²⁰ It is better practice to obtain an order *ex parte* permitting such payment,²¹ When that is done, an injunction

¹³ *Barry v. Mutual Life Ins. Co.*, 53 N. Y. 536; *Wood v. Swift*, 81 N. Y. 31, 35; *Board of Education v. Scoville*, 13 Kan. 17, 30; *Prudential Assurance Co. v. Thomas*, L. R. 3 Ch. App. 74, 77.

¹⁴ *Spring v. South Carolina Ins. Co.*, 8 Wheat. 268.

¹⁵ *Mitford's Eq. Pl. ch. 1*; *Story's Eq. Pl. §§ 291-297*.

¹⁶ *Metcalf v. Hervey*, 1 Ves. Sen. 248.

¹⁷ *Bignold v. Audland*, 11 Simons, 23.

¹⁸ *Metcalf v. Hervey*, 1 Ves. Sen. 248; *Tobin v. Wilson*, 3 J. J. Marsh. (Ky.) 67; *Mitford's Eq. Pl. ch. 1*.

¹⁹ *Meux v. Bell*, 6 Simons, 175; *Williams v. Walker*, 2 Richardson Eq. (S. C.) 291.

²⁰ *Meux v. Bell*, 6 Simons, 175.

²¹ *Williams v. Walker*, 2 Richardson Eq. (S. C.) 291.

will be granted restraining the defendants from suing the plaintiff, and from continuing any action already begun touching the matter in dispute.²² The injunction is usually granted to take effect upon payment of the fund into court.²³ Under special circumstances, however, a stay order might be granted until the complainant had an opportunity to do so.²⁴ Upon an argument to dissolve this injunction before hearing, it seems that the defendants cannot contradict the affidavit that there is no collusion;²⁵ but a reference may be directed when such a charge is made, and at the hearing collusion may be shown.²⁵ In England, a bill of interpleader can be successfully maintained though all the defendants are beyond the jurisdiction of the court.²⁷ Such suits are usually heard on bill and answers; although there is no reason why testimony should not be taken. If at the hearing the cause is ripe for a decision, the court will then decide the controversy between the defendants.²⁸ If not, it will enter a decree dismissing the plaintiff with his costs, enjoining the defendants in accordance with the prayer of the bill, and directing them to interplead.²⁹ If the claims on both sides are purely legal, an action or an issue at law will usually be directed. If one of them is of an equitable nature, and sometimes even when both are legal, a reference to a master is usually directed.³⁰ At the hearing, each defendant may read the other's answer against him.³¹ If one of them has allowed the bill to be taken as confessed against him, this is considered as an admission that the bill was properly filed, and that he has made an improper claim against the fund.³² If, after answer, one of them defaults at the hearing, the court will enter a decree after hearing the other.³³

²² *Sieveking v. Behrens*, 2 Myl. & Cr. 581.

²³ *Sieveking v. Behrens*, 2 Myl. & Cr. 581.

²⁴ *Sieveking v. Behrens*, 2 Myl. & Cr. 581; U. S. R. S. § 718.

²⁵ *Stevenson v. Anderson*, 2 Ves. & B. 407; *Manby v. Robinson*, L. R. 4 Ch. App. 347; *Fahie v. Lindsay*, 8 Oreg. 474.

²⁶ *Manby v. Robinson*, L. R. 4 Ch. App. 347; *Langston v. Boylston*, 2 Ves. Jr. 101; *Dungey v. Angove*, 2 Ves. Jr. 304.

²⁷ *Martinus v. Helmuth*, G. Cooper, 248; *Stevenson v. Anderson*, 2 Ves. & B. 412. *Contra*, *Herndon v. Ridgeway*, 17 How. 424; and see § 96.

²⁸ *Daniell's Ch. Pr.* (2d Am. ed.) 1765; *Angell v. Hadden* 16 Ves. 202; *City Bank v. Bangs*, 2 Paige (N. Y.), 570.

²⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 1765; *Angell v. Hadden*, 16 Ves. 202; *City Bank v. Bangs*, 2 Paige (N. Y.), 570.

³⁰ *Daniell's Ch. Pr.* 1765; *Story's Eq. Jur.* § 822; *Angell v. Hadden*, 16 Ves. 202; *City Bank v. Bangs*, 2 Paige (N. Y.), 570.

³¹ *Bowyer v. Pritchard*, 11 Price, 103; *Daniell's Ch. Pr.* 1765.

³² *Badeau v. Rogers*, 2 Paige (N. Y.), 209; *Fairbrother v. Prattent*, 1 Daniel, 64.

³³ *Hodges v. Smith*, 1 Cox Eq. 357.

The plaintiff, if successful, is entitled to his costs out of the fund, if there be one.³⁴ Otherwise, from the defendant whose claim is finally held bad.³⁵ These costs, as well as the costs of the successful defendant, must eventually be paid by him whose claim is finally dismissed.³⁶ It has been said that when the bill is dismissed, there can be no further proceedings in the cause as between the defendants; not even by consent; inasmuch as the court has thereby lost jurisdiction.³⁷ After a decree in the plaintiff's favor, the cause is terminated as to him; and in case of his subsequent death the cause will proceed without a revivor.³⁸

§ 89. **Bills in the Nature of Interpleader.** — Where the plaintiff claims for himself some interest in the fund or matter in question, or does not admit the whole of a defendant's claim, or the defendants claim different amounts, although a bill of interpleader may not, a bill in the nature of an interpleader may, perhaps, be sustained.¹ The frame of such a bill and the proceedings thereunder should conform, *mutatis mutandis*, to those of a strict bill of interpleader. After payment of what he admits to be due, a decree may be entered discharging the plaintiff as to that, and directing the suit, or, if an action at law had previously been begun, the latter, to proceed till his disputed rights are determined.²

§ 90. **Bills of Certiorari.** — A bill of *certiorari* was a bill filed in a superior court of equity for the purpose of removing thither a suit in equity pending in an inferior court, on account of some alleged incompetency in the latter or some defect in its proceedings.¹ Such a bill first stated the proceedings in the inferior court: then the cause of its incompetency, as, for example, that the subject of the action or the parties were not within its jurisdiction, or that, for some other cause, equal justice could not be

³⁴ *Dunlop v. Hubbard*, 19 Ves. 205; *Dowson v. Hardeastle*, 2 Cox Eq. 279.

³⁵ *Aldridge v. Mesner*, 6 Ves. 418; *Mason v. Hamilton*, 5 Simons, 19; *Daniell's Ch. Pr.* 1767.

³⁶ *Mason v. Hamilton*, 5 Simons, 19; *Cowan v. Williams*, 9 Ves. 107; *Daniell's Ch. Pr.* (2d Am. ed.) 1766, 1767.

³⁷ *Jennings v. Nugent*, 1 Molloy, 134.

³⁸ *Anon.*, 1 Vern. 351; *Jennings v. Nugent*, 1 Molloy, 134; *Daniell's Ch. Pr.* 1765.

§ 89. ¹ *Dorn v. Fox*, 61 N. Y. 264; *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige (N. Y.), 385; *Story's Eq. Pl.* § 297 b; *Daniell's Ch. Pr.* (2d Am. ed.) 1768. *Contra*, *New England Mutual Life Ins. Co. v. Odell*, 50 Hun (57 N. Y. S. C. R.), 279.

² *City Bank v. Bangs*, 2 Paige (N. Y.), 570.

§ 90. ¹ *Mitford's Pl. Ch.* 1; *Story's Eq. Pl.* § 298.

done there; and finally prayed a writ of *certiorari*, to certify and remove the record and the cause to the superior court.² It did not pray that the defendant should answer, or even that he should appear to the bill, and, consequently, prayed for no writ of subpœna, although a subpœna had to be sued out and served.³ It was considered as an original bill, and filed as such in the superior court. Thereupon, the plaintiff was required to execute a bond in the penalty of £100, with one surety conditioned to prove the suggestions of the bill in fourteen days. A subpœna was next sued out and served; and a writ of *certiorari* issued directed to the judge of the inferior court, requiring him to certify or send to the court issuing the writ the tenor of the bill or plaint below, with the process or proceedings thereon. The writ having been served and returned, together with the required statement and papers, an order directing them to be filed was then obtained. Testimony to prove or disprove the suggestions of the bill was immediately taken, and the cause referred to a master to report whether they were proven or no. This was required to be done within fourteen days, unless the court specially enlarged the time. If the allegations were proved and showed a sufficient reason for retaining the suit, an order to retain the bill was granted; and the defendant below was obliged to answer, and the cause removed proceeded in the same manner as if it had been originally instituted in the superior court.⁴ In no reported case has such a bill been filed in a court of the United States, although petitions for writs of *certiorari* in proceedings at common law are not uncommon.⁵

² Story's Eq. Pl. § 298.

⁴ Hinde's Pr. 28-32 and 581, 582.

³ Story's Eq. Pl. § 298; Mitford's Pl. ch. 1.

⁵ See *infra*, § 365.

CHAPTER V.

SUBPŒNAS TO APPEAR AND ANSWER.

§ 91. **Definition and Form of Subpœna.** — The first process in a court of equity is the subpœna, which is a writ requiring the defendant to appear and answer the bill under a penalty therein expressed. A similar writ, called *quibusdam certis de causis*, in the form of a subpœna without any penalty, is also found in some of the early English chancery cases.¹ The process of subpœna constitutes the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill.² These writs, like all writs and processes issuing from the courts of the United States, must be under the seal of the court from which they issue, and signed by the clerk thereof. Those issuing from the Supreme Court or a Circuit Court must bear teste of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence; and those issuing from a District Court must bear teste of the judge, or, when that office is vacant, of the clerk thereof.³ When issued from the Supreme Court the writ must be in the name of the President of the United States.⁴ It must be returnable into the clerk's office the next rule day, or, at the election of the plaintiff, the next rule day but one, occurring twenty days from the time of the issue thereof,⁵ except in the Supreme Court when the return day must be at least sixty days after service of the writ.⁶ "At the bottom of the subpœna shall be placed a memorandum that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable, otherwise the bill may be taken *pro confesso*."⁷ The penalty named in the writ is now usually two hundred and fifty

§ 91. ¹ Judge O. W. Holmes, Jr., in an article on Early English Equity, 1 Law Quarterly Review, 162, note 2, citing Palgrave, King's Council, 131, 132, note x; Scaldwell v. Stormesworth, 1 Cal. Ch. 5.

² Rule 7.

³ U. S. R. S. § 911.

⁴ Rule 5 of the Supreme Court of the United States.

⁵ Rule 12.

⁶ Supreme Court Rule 5.

⁷ Rule 12.

dollars; in earlier times it might be life or limb;⁸ but it is never enforced; since the taking of the bill as confessed affords a far more substantial remedy. The subpœna should be addressed to the defendant against whom it is issued.⁹ "When there are more than one defendant, a writ of subpœna may, at the option of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpœna against all the defendants."¹⁰ If a defendant is sued in a representative capacity, or in both an individual and a representative capacity, he should be so described in the subpœna; which should in this respect follow the prayer of process in the bill.¹¹ Otherwise, the service of the subpœna may be set aside upon motion, as issued without authority.¹² Such a defect will, however, be waived, if the defendant enter his general appearance in his representative capacity.¹³

The usual form of a subpœna in a circuit court of the United States is substantially as follows:—

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO JOHN ABER:

GREETING, — You are hereby commanded that you personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit Court, in Equity, on the first Monday of December, A.D. 1889, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said court by ARCHIBALD BROWN, and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you of TWO HUNDRED AND FIFTY DOLLARS.

WITNESS, Honorable MELVILLE W. FULLER, Justice of the United States at the City of New York, on the first day of November in the year one thousand eight hundred and eighty-nine, and of the independence of the United States of America, the one hundred and thirteenth.

ROBERT JONES, *Complainant's Sol'r*,

JOHN A. SHIELDS, *Clerk*.

⁸ Judge O. W. Holmes, Jr., in an article on Early English Equity, 1 *Law Quarterly Review*, 162, note 2, citing 1 Proceedings Privy Council (21 R. 2, A. D. 1397).

⁹ Daniell's Ch. Pr. (2d Am. ed.) 495.

¹⁰ Rule 12.

¹¹ *Carter v. Ingraham*, 43 Ala. 78; *Walton v. Herbert*, 3 Green Ch. (N. J.)

73; *Brasher v. Van Cortlandt*, 2 J. Ch. (N. Y.) 247.

¹² *Walton v. Herbert*, 3 Green Ch. (N. J.) 73; *Brasher v. Van Cortlandt*, 2 J. Ch. (N. Y.) 242, 247.

¹³ *Walton v. Herbert*, 3 Green Ch. (N. J.) 73; *Brasher v. Van Cortlandt*, 2 J. Ch. (N. Y.) 242, 247; *Buerk v. Imhaeuser*, 8 Fed. R. 457.

The Defendant is required to enter appearance in the above cause in the Clerk's office of this Court on or before the first Monday of December, 1889, or the bill will be taken *pro confesso* against him.

JOHN A. SHIELDS, *Clerk*.

§ 92. **Issue of the Subpœna.** — No process of subpœna can issue from the clerk's office in any suit in equity until the bill is filed in the office.¹ Whenever a bill is filed the clerk must issue the process of subpœna thereon, as of course, upon the application of the plaintiff.² The signature of counsel is a sufficient warrant for his so doing. A præcipe, or written order for the subpœna, signed by the attorney is usually first given him. In the early times, the bill was first examined by one of the masters in chancery, whose duty it was to determine whether to dismiss the bill by original or to retain it by subpœna.³ The present practice, it is said, originated when Sir Thomas More was Keeper.⁴ In the Supreme Court of the United States a motion for leave to file a bill must first be made. This is usually heard *ex parte*;⁵ but when leave was asked to file a bill against the President of the United States, under the peculiar circumstances of that case it was thought proper that argument should be heard against the motion for leave.⁶ The court refused to extend this exception so as to include a suit by a State against General Grant when in command of the army, but then required ten printed copies of the bill to be filed with the clerk before the hearing, which it determined should be the regular practice in all cases of original jurisdiction brought before it.⁷ Whenever any subpœna is returned not executed as to any defendant, the plaintiff is entitled to another subpœna, *toties quoties*, against such defendant, if he requires it, until due service is made."⁸

§ 93. **When a Subpœna is necessary.** — No defendant can be brought before the court against his will without the service of a subpœna upon him.¹ A general appearance will, however,

§ 92. ¹ Rule 11.

² Rule 12.

³ Treatise on Masters of the Chancery, 1 Harg. Law Tracts, 302; Daniell's Ch. Pr. (2d Am. ed.) 357.

⁴ Treatise on Masters of the Chancery, 1 Harg. Law Tracts, 302; Daniell's Chancery Practice (2d American edition), 357.

⁵ State of Georgia v. Grant, 6 Wall. 241.

⁶ State of Georgia v. Grant, 6 Wall. 241, 242; State of Mississippi v. Johnson, 4 Wall. 475.

⁷ State of Georgia v. Grant, 6 Wall. 241.

⁸ Rule 14.

§ 93. ¹ Rule 7.

waive such an omission.² After a bill has been amended with no further change than the bringing in of new parties defendant, they alone need be served with a new subpœna.³ If, however, it be otherwise substantially amended, according to the English practice a subpœna to answer the amendments had to be served upon all the defendants.⁴ A subpœna to appear and answer a bill of revivor should be substantially in the form of a subpœna to an original bill, except that it requires the proper representatives of the party against whom it issues to appear at the next rule-day, which shall occur after fourteen days from the time of the service of the process, and there show cause, if any they have, why the cause should not be revived.⁵

§ 94. **Personal Service of a Subpœna.**—Except in certain exceptional cases the service of the subpœna must be personal. It must be made by the marshal of the district or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise.¹ “When the marshal or his deputy is a party in any cause, the writs and præcepts therein shall be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.”² If the marshal or his deputy make the service, his unverified return is sufficient,³ and it has been said cannot be contradicted,⁴ the only remedy being an action against the officer for a false return.⁵ But it is capable of subsequent amendment.⁶ Where there has been personal service upon the defendant by a special deputy, the fact that the return was in the name of such deputy instead of in the name of the marshal was held an irregularity which did not avoid the judgment when attacked in a collateral proceeding.⁷ It has been held that the return to a State court by a sheriff cannot be amended after a removal.⁸ The return should state

² *Buerk v. Imhaeuser*, 8 Fed. R. 457.

³ *Longworth v. Taylor*, 1 McLean, 514; *Angerstein v. Clarke*, 1 Ves. Jr. 250; *Skeffington v. —*, 4 Ves. 66.

⁴ *Cooke v. Davies*, T. & R. 309; *Bramston v. Carter*, 2 Simons, 458. See *Kendall v. Beckett*, 1 Russ. 152.

⁵ Rule 56.

§ 94. ¹ Rule 15; *Deacon v. Sewing Machine Co.*, 14 Reporter, 43.

² U. S. R. S. § 922.

³ *Von Roy v. Blackman*, 3 Woods, 98, Fed. R. 156.

101; *Phoenix Ins. Co. v. Wulf*, 1 Fed. R. 775; Rule 16.

⁴ *Von Roy v. Blackman*, 3 Woods, 98, 100. But see *McClaskey v. Barr*, 45 Fed. R. 151.

⁵ *Von Roy v. Blackman*, 3 Woods, 98, 100.

⁶ *Phoenix Ins. Co. v. Wulf*, 1 Fed. R. 775.

⁷ *Hill v. Gordon*, 45 Fed. R. 276.

⁸ *Tallman v. Baltimore & O. R. Co.*, 45

where the service was made, if the defendant reside without the district,⁹ and probably in any event. If another than the marshal or his deputy serve the subpœna, proof must be made by the affidavit of the process-server.¹⁰ Where the defendant was named in the bill as Jacob Kraig, a return that the subpœna had been served on Jacob King was held insufficient.¹¹ The indorsement by the defendant upon a subpœna issued from the circuit court for Vermont: "Washington, D. C., October 18th, 1883. I hereby accept service of the within subpœna, to have the same effect as if duly served upon me by a proper officer, and I do hereby acknowledge the receipt of a copy thereof. E. M. Marble, Com'r of Patents," has been held to be nothing more than that "the commissioner admits service with the same effect it would have if made by an officer of the District of Columbia," and not to be a waiver of the objection that the subpœna could not properly be served beyond the jurisdiction of the court whence it issued.¹² A case at circuit holds that an acceptance of due service of process amounts to no more than personal service at the place where the acceptance is made, and is not a waiver of the objection that the defendant is not an inhabitant of the district.¹³ "The service of all subpœnas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant with some adult person who is a member or resident of the family."¹⁴ When a husband and wife are parties a copy must be served upon each, although the former practice was complied with by service upon the husband alone.¹⁵ Service at the door of the defendant's dwelling has been held a sufficient compliance with the rule.¹⁶ In an English case, where infant defendants were secreted, service upon their mother was allowed, and held sufficient.¹⁷ Chief Baron Gilbert, in his "Forum Romanum," says of the subpœna: "The service is good in the night or on Sunday, if it be before the time of the return;

⁹ *Allen v. Blunt*, 1 Blatchf. 480, 487; *Thayer v. Wales*, 5 Fisher's Pat. Cas. 448.

¹⁰ Rule 15.

¹¹ *McClaskey v. Barr*, 45 Fed. R. 151.

¹² *Butterworth v. Hill*, 114 U. S. 128, 132, 133.

¹³ *United States v. Loughrey*, 43 Fed. R. 449.

¹⁴ Rule 13. See *Phoenix Ins. Co. v. Wulf*, 1 Fed. R. 775; *Hyslop v. Hoppock*, 5 Ben. 447.

¹⁵ *O'Hara v. MacConnell*, 93 U. S. 150; *Robinson v. Cathcart*, 2 Cranch C. C. 590.

¹⁶ *Phoenix Ins. Co. v. Wulf*, 1 Fed. R. 775.

¹⁷ *Smith v. Marshall*, 2 Atk. 70.

for this being only process of notice, and not to arrest the parties, it can create no disturbance, though it be served in the night or on Sunday.”¹⁸ It has, however, since been held in England that a service on Sunday may be set aside.¹⁹ A decision at circuit holds that, in an extraordinary case, a warrant of arrest in admiralty can be issued on Sunday.²⁰ Personal service of the subpœna cannot, in the absence of any special statutory provision, be made beyond the territorial jurisdiction of the court;²¹ except when a subpœna issues from a court in a State which is divided into two districts, in which case, it seems, that it may be served in either district within the same State.²² When a petition is filed by a district attorney of the United States praying an injunction against a combination in restraint of commerce among the several States or with foreign nations, the subpœna may be served by leave of the court in any district by the marshal thereof.²³ “Upon the return of the subpœna as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.”²⁴

§ 95. **Service upon Corporations.** — If the United States is sought to be made a party defendant, the subpœna should be served upon the attorney-general or the district attorney of the district where the suit is brought.¹ “When process at common law or in equity shall issue against a State, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such State.”² When a suit is brought against a domestic corporation, that is, one chartered within the State in which is the district where the suit is brought, the subpœna should be served upon one of its officers, or perhaps one of its members.³ The State practice in such cases, although not binding upon the Federal courts in equity, furnishes a guide which they are apt to follow.⁴ The jurisdiction of the Circuit

¹⁸ Gilbert's *Forum Romanum* (Tyler's edition), 42.

¹⁹ *Mackreth v. Nicholson*, 19 Ves. 367.

²⁰ *Pearson v. The Alsalfa*, 44 Fed. R. 358; U. S. D. C. D., S. C.

²¹ *Toland v. Sprague*, 12 Pet. 300, 328; *Picquet v. Swan*, 5 Mason, 35; *Bourke v. Amison*, 32 Fed. R. 710.

²² *Winter v. Ludlow*, 3 Phila. (Pa.) 464.

²³ Act of July 2, 1890 (26 St. at L. ch. 647, § 5, p. 210). See Appendix.

²⁴ Rule 16.

§ 95. ¹ Hoffman's Ch. Pr. 108; Daniel's Ch. Pr. (2d Am. ed.) 517, note 4.

² Supreme Court Rule 5; *Grayson v. Virginia*, 3 Dall. 320.

³ Daniel's Ch. Pr. (2d Am. ed.) 501, and note 2. But see *St. Clair v. Cox*, 106 U. S. 350, 359.

⁴ *Thornburgh v. Savage Mining Co.*, 1 Pacific Law Mag. 267. See *infra*, § 360.

and District Courts of the United States over foreign corporations is, on account of the obscurity of the Judiciary Act of 1887, a doubtful question.⁵ The weight of authority seems to hold that when the jurisdiction rests solely upon the existence of a federal question in the case, not arising under the statute against combinations in restraint of commerce, such a court has no jurisdiction over a foreign corporation;⁶ but that when jurisdiction is claimed on account of a difference of citizenship in a suit between citizens of different States, a foreign corporation may be served with process provided it be "found" within the district.⁷ What constitutes such a finding is a matter hard to define with accuracy. If a State statute forbids a foreign corporation to transact business within her borders except upon condition that the corporation stipulate to allow legal process to be served upon it, and the company execute such a stipulation, which is not in express terms restricted to the process of a State court, it will be considered to apply to the Federal courts, and a subpoena from a Federal court may be served upon the foreign corporation in the same way as would a similar process of a State tribunal.⁸ Such condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is deemed to be a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process.⁹ "Such condition must not, however, en-

⁵ 24 St. at L. ch. 373. Cf. *Filli v. D. L. & W. R. R. Co.*, 37 Fed. R. 65; *Hohorst v. Hamburg Amer. Packet Co.*, 38 Fed. R. 273; and *Denton v. International Co. of Mexico*, 36 Fed. R. 1; with *Zambrino v. Galveston, H. & S. A. Ry. Co.*, 38 Fed. R. 449; and *Riddle v. N. Y. L. E. & W. R. Co.*, 39 Fed. R. 290; and see § 22.

⁶ *McCormick H. M. Co. v. Walthers*, 134 U. S. 41; *St. Louis, V. & T. H. R. R. Co. v. Terre Haute & I. R. R. Co.*, 33 Fed. R. 385, 386. See *County of Yuba v. Pioneer Gold Mining Co.*, 32 Fed. R. 183; Act of July 2, 1890 (26 St. at L. ch. 647, § 5, p. 210); and *supra*, § 22.

⁷ *McCormick H. M. Co. v. Walthers*, 134 U. S. 41; *Fales v. Chicago, M. & St. P. Ry. Co.*, 32 Fed. R. 673; *Short v. Chicago, M. & St. P. Ry. Co.*, 33 Fed. R. 114; *St. Louis, V. & T. H. R. R. Co. v. Terre Haute & L. R. R. Co.*, 33 Fed. R. 385; *Bostwick v. American Finance Co.*, 43 Fed. R. 897; *supra*, § 22. *Contra*, *County of Yuba v. Pioneer Gold Mining Co.*, 32 Fed. R. 183.

⁸ *Ex parte Schollenberger*, 96 U. S. 369; overruling several cases to the contrary previously decided in the Circuit Courts.

⁹ *St. Clair v. Cox*, 106 U. S. 350, 356.

croach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation."¹⁰ Service upon an agent who stood in no representative character to the company, whose duties were limited to those of a subordinate employé, or to a particular transaction, or whose agency had ceased when the matter in dispute arose, would, probably, be held insufficient.¹¹ In order thus to subject itself to the service of process, the foreign corporation must actually transact business in the district where the suit is brought.¹² A single act of business, such as the making of a contract there for the sale of an article to be manufactured elsewhere and there delivered, would not be sufficient, "when there was no purpose to do any other business or to have a place of business" within the district.¹³ So, it has been held, that the presence of the principal officers of a corporation in a foreign State, when they have with them property of the corporation merely for the purpose of exhibition, does not make the corporation liable to the service of process upon them there.¹⁴ The lease by a foreign to a domestic corporation of personal property, and the payment by the latter to the former of a part of the profits derived from the use of such property within the jurisdiction of the court, does not give the court jurisdiction over the former corporation, upon service of a subpœna upon the latter as its agent.¹⁵ The negotiation of loans upon a mortgage and a successful application to have the bonds thereby secured listed on the stock exchange, are not sufficient acts of business to authorize service of process upon

¹⁰ *Mr. Justice Field in St. Clair v. Cox*, 106 U. S. 350, 356. See also *Hayden v. Androscoggin Mills*, 1 Fed. R. 93; *Estes v. Belford*, 22 Fed. R. 275.

¹¹ *St. Clair v. Cox*, 106 U. S. 350, 359, 360; *Maxwell v. Atchison, T. & S. F. R. Co.*, 34 Fed. R. 286.

¹² *Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727; *Hayden v. Androscoggin Mills*, 1 Fed. R. 93; *Zambrino v. Galveston, H. & S. A. Ry. Co.*, 38 Fed. R. 449; *Riddle v. N. Y. L. E. & W. R. Co.*, 39 Fed. R. 290; *Maxwell v. Atchison, T. & S. F. R. Co.*, 37 Fed. R. 286; *Filli v. D. L. & W. R. R. Co.*, 37 Fed. R. 65; *Hohorst v. Ham-*

burg Amer. Packet Co., 38 Fed. R. 273; *Denton v. International Co. of Mexico*, 36 Fed. R. 1; *Block v. Atchison, T. & S. F. R. Co.*, 21 Fed. R. 529.

¹³ *Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727, 735; *Good Hope Co. v. Railway Barb Fencing Co.*, 22 Fed. R. 635; *Maxwell v. Atchison, T. & S. F. R. Co.*, 34 Fed. R. 286.

¹⁴ *Carpenter v. Westinghouse Air Brake Co.*, 32 Fed. R. 434. See *Reifsnider v. American Imp. Pub. Co.*, 45 Fed. R. 433.

¹⁵ *United States v. American Bell Telephone Co.*, 29 Fed. R. 17.

its president for the corporation while he is temporarily within the State for those purposes.¹⁶ It has been held, at circuit, that service of process in the manner prescribed by the State practice may subject a foreign corporation to the jurisdiction of the Federal court, in a case over which the State courts have no jurisdiction because the cause of action arose without the State.¹⁷ It has been said, however, "that in the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the Federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the State in which the court is held, viz.: (1) It must appear as a matter of fact that the corporation is carrying on its business in such foreign State or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and (3) the existence of some local law making such corporation, or foreign corporations generally, amenable to suit there, as a condition, express or implied, of doing business in the State."¹⁸

§ 96. **Substituted Service of a Subpœna.** — Independently of any express statutory authority, there is no power in a court of equity to order actual personal service to be effected upon a defendant beyond its territorial jurisdiction;¹ but, in a few cases, such courts have for more than a century assumed the power of ordering service to be made within their jurisdiction upon some person for the absent defendant, and have treated such service as valid.² In suits to stay proceedings at law in the same court, the service of a subpœna upon the attorney of the plaintiff at law may be allowed, and will then bind the latter if he be beyond the territorial jurisdiction of the court.³ A similar practice would in all probability be allowed in serving process under bills not origi-

¹⁶ *Clews v. Woodstock Iron Co.*, 44 Fed. R. 31.

¹⁷ *Carstairs v. Mechanics' & Traders' Ins. Co. of N. Y.*, 13 Fed. R. 823.

¹⁸ *United States v. American Bell Telephone Co.*, 29 Fed. R. 17, 35. See *Maxwell v. Atchison, T. & S. F. R. R. Co.*, 34 Fed. R. 286, 289.

§ 96. ¹ This passage was quoted and approved by Maxey, J., in *Batt v. Proctor*, 45 Fed. R. 515, 516.

² *Hales v. Sutton*, 1 Dickens, 26; s. c. *sub nom. Hallett v. Sutton*, 12 Simons,

145, note; *Carter v. De Brune*, 1 Dickens, 39; *Hyde v. Forster*, 1 Dickens, 102; *Lady Carrington v. Cantillon*, Bunbury, 107; *Hobhouse v. Courtney*, 12 Simons, 140, and cases there cited; *Daniell's Ch. Pr.* (2d Am. ed.) 502-508.

³ *Dunn v. Clarke*, 8 Pet. 1; *Hitner v. Suckley*, 2 Wash. 465; *Eckert v. Bauert*, 4 Wash. 370; *Ward v. Seabry*, 4 Wash. 426; *Read v. Consequa*, 4 Wash. 174; *Bartlett v. Sultan of Turkey*, 19 Fed. R. 346. See also *Logan v. Patrick*, 5 Cranch, 288; *Dunlap v. Stetson*, 4 Mason, 349.

nal; namely, bills of revivor, supplemental bills, and bills of revivor and supplement; which are nothing more than continuations of the suits upon which they operate.⁴ So, under a bill to reform an insurance policy pending an action at law upon the policy, a subpœna may be thus served upon the attorney for the party to the action at law.⁵ The Federal courts have refused to extend this class of cases so as to include a bill of interpleader, two of the defendants to which were engaged in a action between themselves in the same court concerning the same matter;⁶ although in England such a mode of service might have been allowed.⁷ Nor, it seems, can a subpœna thus be served under a bill to set aside a sale made under a decree of the same court to which persons are joined as defendants who were not parties to the former suit.⁸ Substituted service of a subpœna to appear and answer to a cross-bill has been allowed,⁹ but not when the cross-bill sought to introduce new and distinct matters into the original suit.¹⁰ The safer practice when a defendant to a cross-bill cannot be served personally seems to be to procure an order staying his proceedings in the original cause until he answers the cross-bill.¹¹ Substituted service was also allowed upon the agent of a defendant beyond the jurisdiction, who had authority to represent the latter with respect to the property which was the subject of the suit.¹² The court may authorize service of process upon the agent of a non-resident receiver.¹³ When this mode of

⁴ *Norton v. Hepworth*, 1 Hall & Twell, 158; *Dunn v. Clarke*, 8 Pet. 1. But see *Henderson v. Meggs*, 2 Brown Ch. C. 127; *Anderson v. Lewis*, 3 Brown Ch. C. 429; *Gardiner v. Mason*, 4 Brown Ch. C. 478; *Waterton v. Croft*, 5 Simons, 502.

⁵ *Abraham v. North German Fire Ins. Co.*, 37 Fed. R. 731.

⁶ *Herndon v. Ridgway*, 17 How. 424. See § 88.

⁷ *Martinus v. Helmuth*, G. Cooper, 248; *Stevenson v. Anderson*, 2 Ves. & B. 407. See § 88.

⁸ *Pacific Railroad of Missouri v. Missouri Pacific Ry. Co.*, 3 Fed. R. 772; s. c. 1 McCrary, 647; s. c. on appeal, 111 U. S. 505, 522.

⁹ *Johnson R. R. Signal Co. v. Union Switch & Signal Co.*, 43 Fed. R. 331; § 173; *Kingsbury v. Buckner*, 134 U. S. 650, 676; *Lowenstein v. Glide*,

well, 5 Dillon, 325; *Sawyer v. Gill*, 3 Woodb. & M. 97; *Segee v. Thomas*, 3 Blatchf. 11; *Hitner v. Suckley*, 2 Wash. 465; *Anderson v. Lewis*, 3 Brown Ch. C. 429; *Gardiner v. Mason*, 4 Brown Ch. C. 478; *Waterton v. Croft*, 5 Simons, 502.

¹⁰ *Rubber Co. v. Goodyear*, 9 Wall. 307; *Heath v. Erie Ry. Co.*, 9 Blatchf. 316. But see *Kingsbury v. Buckner*, 134 U. S. 650, 676. See *infra*, § 173.

¹¹ *Sawyer v. Gill*, 3 W. & M. 97; *Segee v. Thomas*, 3 Blatchf. 11; *Hitner v. Suckley*, 2 Wash. 465; *Anderson v. Lewis*, 3 Brown Ch. C. 429; *Gardiner v. Mason*, 4 Brown Ch. C. 478; *Waterton v. Croft*, 5 Simons, 502.

¹² *Hobhouse v. Courtney*, 12 Simons, 140, and cases cited. But see U. S. R. S. § 793.

¹³ *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, 40 Fed. R. 426.

service is desired, an order must be obtained that service upon the attorney employed in the former suit or action shall be deemed good service.¹⁴ If service be made upon the attorney without such an order having been obtained, it may be set aside.¹⁵ The motion for such an order may ordinarily be made *ex parte*.¹⁶ It must be supported by an affidavit, made by the plaintiff or some person having personal knowledge of the facts therein stated, setting forth the reasons why such service is desired, and verifying the allegations of the bill.¹⁷ Written admissions of the defendant may, however, be sufficient to support the motion without such affidavit.¹⁸ A previous request of the attorney to accept service of the subpœna and his refusal so to do, are not a necessary preliminary to such a motion.¹⁹

§ 97. **Statutory Service of a Subpœna.**—The statutes of the United States, which in this respect are analogous to those of England,¹ provide, "That when in any suit, commenced in any court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct not less than once a week for six consecutive weeks; and in case such absent defendant

¹⁴ *Pacific Railroad of Missouri v. Missouri Pacific Ry. Co.*, 3 Fed. R. 772; s. c. 1 McCrary, 647; *Daniell's Ch. Pr.* (2d Am. ed.) 502.

¹⁵ *Pacific Railroad of Missouri v. Missouri Pacific Ry. Co.*, 3 Fed. R. 772; s. c. 1 McCrary, 647.

¹⁶ *Daniell's Ch. Pr.* (2d Am. ed.) 503. But see *Crew v. Martin*, 1 Fowler Ex. Pr. 225.

¹⁷ *Pacific Railroad of Missouri v. Missouri Pacific Ry. Co.*, 3 Fed. R. 772; s. c. 1 McCrary, 647.

Missouri Pacific Ry. Co., 3 Fed. R. 772; s. c. 1 McCrary, 647; *Delancy v. Wallis*, 3 Brown's C. C. 12; *Stephen v. Cini*, 4 Ves. 359; *Kenworthy v. Accunor*, 3 Madd. 550.

¹⁸ *Royal Exchange Ins. Co. v. Ward*, 1 Fowler Ex. Pr. 225.

¹⁹ *French v. Roe*, 13 Ves. 593.

§ 97. ¹ 2 Wm. IV. c. 33; 4 & 5 Wm. IV. c. 82.

shall not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit, and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the courts shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."² A subpœna cannot thus be served when the main object of the bill is for an accounting by an absent and non-resident defendant, although there is also a prayer for the appointment of a receiver of property within the district.³ It seems that service can thus be made in a suit to establish a trust in real estate although the bill also prays an accounting.⁴ It has been held no defense to such a suit that neither the defendants thus served by publication nor the plaintiff are residents of the district.⁵ Process cannot thus be served in a suit to remove a cloud upon the title to a patent-right although the official letters-patent evidencing the patent-right are within the jurisdiction.⁶ Process may thus be served in a suit to foreclose

² U. S. R. S. § 738; as amended by act of March 3, 1875, ch. 137, § 8 (18 St. at L. 472.)

³ *Ellis v. Reynolds*, 35 Fed. R. 394. But see *Porter Land & Water Co. v. Baskin*, 43 Fed. R. 323.

⁴ *Porter Land & Water Co. v. Baskin*, 43 Fed. R. 323.

⁵ *Ames v. Holderbaum*, 42 Fed. R. 341.

⁶ *Non-Magnetic Watch Co. v. Association H. S. of Geneve*, 44 Fed. R. 6

a railway mortgage.⁷ It has been said, that a claim to a certain number of undesignated shares of stock in a corporation chartered within the district is not property within that district when the holder of the legal title to the stock is domiciled elsewhere.⁸ An absent judgment debtor may thus be served in a suit by the creditor to appropriate his assets.⁹ It has been held at circuit : that an order in pursuance of this statute may be obtained immediately on filing the bill, upon proof by affidavit that the defendant does not dwell within the district, and cannot be served or found therein ;¹⁰ that the day named for his appearance need not be one of the rule days of the court ;¹¹ that personal service of the order must be made in all cases where the residence of the absent defendant is known or can be ascertained, or service upon him can be made within a reasonable time and by the exercise of reasonable diligence ; and that its service by publication can only be authorized upon proof by affidavit of the facts showing that personal service without the jurisdiction is impracticable.¹² The affidavit should state the known places of residence of the absent defendants, and show that diligence has been used to ascertain the places of residence which are unknown.¹³ The fact that it would be very expensive to make personal service upon the absent defendant whose residence was known was held no ground for allowing service by publication.¹⁴ If the absent defendant reside in another district of the United States, the safer practice is to obtain an order directing the marshal of that district to serve him.¹⁵ A defect in personal service or the fact that personal service was obtained by fraud will not prejudice proceedings regularly taken under this statute.¹⁶

§ 98. Exemptions from Service of Subpœna or other Process. Legal or Equitable, other than Arrest. — Chief Justice Marshall, in the course of the trial of Aaron Burr, ordered that a *subpœna duces tecum* should issue against President Jefferson. Jefferson, however, refused to obey the subpœna, while expressing

⁷ Farmers' L. & Tr. Co. v. Houston & T. C. Ry. Co., 44 Fed. R. 115.

⁸ Kilgour v. New Orleans Gas-light Co., 2 Woods, 144.

⁹ Brigham v. Luddington, 12 Blatchf. 237. Compare Picquet v. Swan, 5 Mason, 35 ; s. c. 5 Mason, 561.

¹⁰ Forsyth v. Pierson, 9 Fed. R. 801. But see Bronson v. Keokuk, 2 Dill. 498.

¹¹ Forsyth v. Pierson, 9 Fed. R. 801.

¹² Bronson v. Keokuk, 2 Dill. 498 ; Batt v. Procter, 45 Fed. R. 515.

¹³ Batt v. Procter, 45 Fed. R. 515.

¹⁴ Batt v. Procter, 45 Fed. R. 515.

¹⁵ Bronson v. Keokuk, 2 Dill. 498 ; Forsyth v. Pierson, 9 Fed. R. 801.

¹⁶ Fitzgerald & M. C. Co. v. Fitzgerald, 137 U. S. 98.

his perfect willingness to furnish the paper desired, if requested in what he considered a proper way. The dispute went no farther.¹ Subsequently, a motion was made for leave to file a bill in the Supreme Court, praying for an injunction against President Johnson to restrain him from executing the reconstruction laws. The attorney-general then took the position that the President was not amenable to process; but that point was not then and has not since been decided.² On the trial of Guiteau for the murder of President Garfield a written statement signed by President Arthur was admitted in evidence by consent without his personal attendance. No other officer or person has been claimed to be above the law. The Federal Constitution provides that senators and representatives "shall in all cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same."³ This has been construed at circuit to exempt them from service of process, unaccompanied by arrest of the person, when on their way to attend a session of Congress;⁴ and it has been further held that such exemption is not lost by a slight deviation from the most direct road to the capital.⁵ In certain cases individuals are temporarily exempt from the service of process. A person temporarily within the district for the purpose of attending, either as witness,⁶ party,⁷ attorney, or counsel,⁸ a trial or other proceeding,⁹ civil or criminal,¹⁰ in a State¹¹ or Federal¹² court, is, while there, exempt from the service of process *eundo, morando, et redeundo*. A similar exemption would probably be applied to

§ 98. ¹ Burr's Trial.

² *Mississippi v. Johnson*, 4 Wall. 475. See *Jefferson's Works*, vol. v. p. 102.

³ Const. Art. I. § 6.

⁴ *Miner v. Markham*, 28 Fed. R. 387.

⁵ *Miner v. Markham*, 28 Fed. R. 387.

⁶ *Person v. Grier*, 66 N. Y. 124, and cases there cited; *Kauffman v. Kennedy*, 25 Fed. R. 785.

⁷ *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Matthews v. Tufts*, 87 N. Y. 568; *Brooks v. Farwell*, 2 McCrary, 220; s. c. 4 Fed. R. 167; *Bridges v. Sheldon*, 7 Fed. R. 17; *Matthews v. Putter*, 10 Fed. R. 606; *Larned v. Griffin*, 12 Fed. R. 590.

⁸ *Matthews v. Tufts*, 87 N. Y. 568.

⁹ *United States v. Bridgman*, 8 Am. Law Record, 541; *Newton v. Askew*, 6 Hare, 319; *Matthews v. Tufts*, 87 N. Y. 568.

¹⁰ *United States v. Bridgman*, 8 Am. Law Record, 541. But see *Jenkins v. Smith*, 57 How. Pr. (N. Y.) 171.

¹¹ *Juneau Bank v. McSpedan*, 5 Biss. 64; *Matthews v. Tufts*, 87 N. Y. 568.

¹² *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *United States v. Bridgman*, 8 Am. Law Record, 541; *Brooks v. Farwell*, 2 McCrary, 220; s. c. 4 Fed. R. 167; *Bridges v. Sheldon*, 7 Fed. R. 17; *Matthews v. Putter*, 10 Fed. R. 606; *Larned v. Griffin*, 12 Fed. R. 590.

any person while temporarily within the district in the discharge of a public duty.¹³ The privilege of a witness does not exempt him from liability to service in a suit arising out of his acts upon that same visit to the jurisdiction.¹⁴ A Federal court will not punish as a contempt the arrest or service of process by a State court upon a foreign witness in attendance before it;¹⁵ though it might perhaps upon *habeas corpus* discharge the witness from such arrest,¹⁶ or punish the party who molested the witness, by a stay of proceedings in a case pending between him and the witness in the Federal court.¹⁷ If a person be fraudulently enticed within the district and then served with process by those who thus induced him to come, the service may be set aside.¹⁸ In one case, when a man was induced by a forged telegram to enter the jurisdiction of the court, the party who served him there was held to be presumptively connected with the fraud.¹⁹

¹³ *Lyell v. Goodwin*, 4 McLean, 29.

¹⁴ *Nichols v. Horton*, 14 Fed. R. 327.

¹⁵ *Ex parte Schulenburg*, 25 Fed. R. 211.

¹⁶ *Ex parte Hurst*, 1 Wash. C. C. 186.

See *Ex parte Schulenburg*, 25 Fed. R. 211, 212.

¹⁷ *Bridges v. Sheldon*, 7 Fed. R. 17, 42;
Ex parte Schulenburg, 25 Fed. R. 211, 213.

¹⁸ *Union Sugar Refinery v. Mathiesson*,

2 Cliff. 304; *Steiger v. Bonn*, 4 Fed. R.

17; *Blair v. Turtle*, 5 Fed. R. 394; s. c.

23 Alb. L. J. 435; *Baker v. Wales*, 14

Abb. Pr. N. S. (N. Y.) 331; *Fitzgerald &*
M. C. Co. v. Fitzgerald, 137 U. S. 98, 105.

¹⁹ *Steiger v. Bonn*, 4 Fed. R. 17.

CHAPTER VI.

APPEARANCE.

§ 99. **Definition of an Appearance.** — An appearance is the process by which a defendant submits himself to the jurisdiction of the court. An appearance is either general or special. By a general appearance a defendant appears for all purposes in the suit. By a special appearance he appears solely for the purpose of objecting to the jurisdiction on account of a defect, omission, or irregularity in the service of the subpoena upon him, or perhaps for some other reason.¹ An appearance *gratis* is an appearance by a defendant who has not been served with process.²

§ 100. **What constitutes an Appearance.** — The proper method of entering an appearance is to deliver to the clerk a *præcipe*, that is, a written direction, ordering him to enter the appearance of the defendant who subscribes it.¹ A defendant may appear in person² or by his attorney. No attorney-at-law can appear in a court of the United States unless authorized by a power of attorney, if he is not a member of the bar of such court. The rules as to admission to the bar of the District and Circuit Courts vary with the different courts. It is the usual practice to recognize in each District and Circuit Court a member of the bar of the Supreme Court of the United States as a member of the bar of such inferior court without requiring any formal order or motion for his admission.³ The Circuit Court of the United States for the Southern District of New York has in one or more cases refused to recognize a member of the bar of the Supreme Court of the United States who had not been admitted to practice in

§ 99. ¹ *National Furnace Co. v. Moline Malleable Iron Works*, 18 Fed. R. 863; *Elliott v. Lawhead*, 43 Ohio St. 171; *Dorr v. Gibboney*, 3 Hughes, 382; *United States v. American Bell Telephone Co.*, 29 Fed. R. 17.

² *Daniell's Ch. Pr.* (2d Am. ed.) 590-595.

§ 100. ¹ *Daniell's Ch. Pr.* (2d Am. ed.) 590, 591.

² U. S. R. S. § 747.

³ See *Goodyear D. V. Co. v. Osgood*, 13 Off. Gaz. 325.

such Circuit Court.⁴ The taking of any proceeding⁵ other than a special appearance and a motion or plea thereon founded, is equivalent to a general appearance.⁶ It has not yet been authoritatively decided whether or not the filing of a petition for a removal from a State to a Federal court is equivalent to a general appearance.⁷ The indorsement and signature by a defendant upon a subpoena of the words, "I hereby accept service of the within subpoena, to have the same effect as if duly served on me by a proper officer, and do hereby acknowledge the receipt of a copy thereof," is not equivalent to an appearance.⁸ A special appearance, it would seem, is only properly made by special leave of the court obtained by an *ex parte* motion;⁹ and it is the safer practice to accompany it with an undertaking by the defendant to abide by the further orders of the court.¹⁰ An appearance *gratis* can only be made by a defendant named in the introduction or prayer for process in the bill unless by consent of all the parties to the suit.¹¹

§ 101. **Effect of an Appearance.**—A general appearance waives all objections to the form or manner of service of the subpoena,¹

⁴ See proceedings in Matter of Application for Writ of *Habeas Corpus* by Joseph Wood, before Lacombe, J., July, 1891.

⁵ *Jones v. Andrews*, 10 Wall. 327; *Thornburgh v. Savage Mining Co.*, 1 Pacific Law Mag. 267; *Livingston v. Gibbons*, 4 J. Ch. (N. Y.) 94, 99.

⁶ *New Jersey v. New York*, 6 Pet. 323; *Van Antwerp v. Hulburd*, 7 Blatchf. 426, 440; *Livingston v. Gibbons*, 4 J. Ch. (N. Y.) 94; *Blackburn v. Selma, M. & M. R. R. Co.*, 2 Flippin, 525; *Fitzgerald & M. Construction Co. v. Fitzgerald*, 137 U. S. 98; *infra*, § 101.

⁷ It was held that it was not, in *Parrott v. Alabama Gold Life Ins. Co.*, 5 Fed. R. 391; *Atchison v. Morris*, 11 Fed. R. 582; *Small v. Montgomery*, 17 Fed. R. 865; *Miner v. Markham*, 28 Fed. R. 387; *Perkins v. Hendryx*, 40 Fed. R. 657; *Golden v. The Morning News of New Haven*, 42 Fed. R. 112; *Porter Land & Water Co. v. Baskin*, 43 Fed. R. 323; *Clews v. Woodstock Iron Co.*, 44 Fed. R. 31; *Reifsnider v. American Imp. Pub. Co.*, 45 Fed. R. 433; *Bentlif v. London & C. F. Corp. Ltd.*, 44 Fed. R. 667; *Estes v. Knickerbocker Life Ins. Co.*, N. Y. C P.

Trial Term, Beach, J., *Daily Register*, Nov. 17, 1882. See also *Freidlander v. Pollock*, 5 Coldw. (Tenn.) 490. But see the conflicting cases of *Sayles v. N. W. Ins. Co.*, 2 Curt. 212; *Bushnell v. Kennedy*, 9 Wall. 387, 393; *Sweeney v. Coffin*, 1 Dill. 73, 75; *Tallman v. Baltimore & O. R. Co.*, 45 Fed. R. 156. See § 391.

⁸ *Butterworth v. Hill*, 114 U. S. 128, 132, 133.

⁹ *Thayer v. Wales*, 5 Fisher's Pat. Cas. 448; *Romaine v. Union Ins. Co.*, 28 Fed. R. 625. But see *Dorr v. Gibboney*, 3 Hughes, 382; *National Furnace Co. v. Moline Malleable Iron Works*, 18 Fed. R. 863.

¹⁰ *Romaine v. Union Ins. Co.*, 28 Fed. R. 625.

¹¹ *Attorney-General v. Pearson*, 7 Simons, 290, 302; *Kentucky Silver Mining Co. v. Day*, 2 Saw. 468, 473.

§ 101. ¹ *Segee v. Thomas*, 3 Blatchf. 11; *Goodyear v. Chaffee*, 3 Blatchf. 268; *Hale v. Continental Life Ins. Co.*, 12 Fed. R. 359; *Provident Savings Life Assurance Society v. Ford*, 114 U. S. 635, 639; *Robinson v. National Stockyard Co.*, 12 Fed. R. 361; s. c. 20 Blatchf. 513; *Buerk v. Imhaeuser*, 8 Fed. R. 457.

including the objection that the defendant was not "found" and did not reside within the district.² A general appearance also waives an omission of the name of the defendant from the prayer of process, provided he was named in another part of the bill.³ A general appearance does not waive an objection to the jurisdiction of the court upon the ground of a lack of the requisite difference of citizenship.⁴ A general appearance does not admit the validity of a writ of foreign attachment previously issued.⁵ If a party joins with a special appearance and motion to set aside service of process a motion to dismiss the suit on another ground, he thereby waives his objection to the irregularity of service, and his proceeding is equivalent to a general appearance.⁶ After a special appearance for the purpose of objecting to the jurisdiction has been made, and the objection overruled, the right to insist upon this objection on an appeal is not lost by a subsequent appearance and defense to the suit upon the merits.⁷ The court has power to allow a general appearance to be changed by amendment to a special appearance,⁸ or to be withdrawn.⁹

§ 102. **When an Appearance must be made.** — "The appearance-day of the defendant shall be the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise, his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable."¹ The first Monday of each month is a rule-day.² A defendant may appear at any time after the filing of the bill, and before the time named in the rule has expired.³ The court has power to enlarge the time for an appearance, if special cause therefor be shown.⁴

² *St. Louis & S. F. Ry. Co. v. McBride*, 141 U. S. 127, 132; *McBride v. Grand de Tour Plow Co.*, 40 Fed. R. 162; *Sayles v. Northwestern Ins. Co.*, 2 Curt. 212; *Shields v. Thomas*, 18 How. 253, 259; *Toland v. Sprague*, 12 Pet. 300, 331; *Butterworth v. Hill*, 114 U. S. 128, 132, 133; *Provident Savings Life Assurance Society v. Ford*, 114 U. S. 635, 639. But see *Noyes v. Canada*, 30 Fed. R. 665.

³ *Segee v. Thomas*, 3 Blatchf. 11; *Buerk v. Imhaeuser*, 8 Fed. R. 457.

⁴ *Romaine v. Union Ins. Co.*, 28 Fed. R. 625; U. S. R. S. 1 Supp. pp. 173, 175; 18 Sts. at L. 470; Act of March 3, 1875, § 5.

⁵ *Lockett v. Rumbaugh*, 45 Fed. R. 23.

⁶ *Fitzgerald & M. C. Co. v. Fitzgerald*, 137 U. S. 98. See also *Jones v. Andrews*, 10 Wall. 327; *St. Louis & S. F. Ry. Co. v. McBride*, 141 U. S. 127, 132.

⁷ *Harkness v. Hyde*, 98 U. S. 476.

⁸ *United States v. Yates*, 6 How. 605; *Hohorst v. Hamburg Amer. Packet Co.*, 38 Fed. R. 273.

⁹ *Rhode Island v. Massachusetts*, 13 Pet. 23.

§ 102. ¹ Rule 17.

² Rule 2.

³ *Heyman v. Uhlman*, 34 Fed. R. 686.

⁴ *Poultney v. City of La Fayette*, 12 Pet. 472.

CHAPTER VII.

TAKING BILLS PRO CONFESSO.

§ 103. **When a Bill may be taken pro confesso.** — If a defendant fails to enter his appearance on or before the day at which the writ is returnable, the bill may be taken as confessed, *pro confesso*.¹ Where the bill when the subpoena was served did not show jurisdiction against a defendant, a subsequent amendment stating facts sufficient to show jurisdiction against it will not warrant the entry of an order taking the bill as confessed without a second service of the subpoena, or an appearance by such defendant.² If a defendant fails to file a plea, answer, or demurrer, to the bill on or before the rule-day next succeeding that of entering his appearance, the plaintiff may have the bill taken *pro confesso*, unless the defendant has had his time enlarged for cause shown by a judge of the court.³ A bill may be also taken as confessed upon the failure of a defendant to answer within the time allowed him after a demurrer or plea has been overruled.⁴ In a proper case, part of a bill may be taken as confessed.⁵ Thus, where the defendant had repeatedly failed to answer an interrogatory, the parts of the bill which the same affected were ordered taken as confessed.⁶ It is uncertain whether, when the defendant after answering the original bill fails to file a further answer to material amendments thereof, the complainant is entitled to have the whole bill taken as confessed, or only the part unanswered.⁷ It is doubtful whether a bill can be taken as confessed against an infant or other person under a disability.⁸ Certainly, it cannot before a guardian *ad litem* has been appointed.⁹ Should the guardian refuse to answer, the safer course for the complainant would be to obtain a reference to a master and prove the allegations of the bill before them.¹⁰

§ 103. ¹ Rule 12.

² *Non-Magnetic Watch Co. of Amer. v. Asso. Hor. of Gen.*, 45 Fed. R. 210. But see *Brown v. Lake Sup. Iron Co.*, 134 U. S. 530.

³ Rule 18.

⁴ *Suydam v. Beals*, 4 McLean, 12.

⁵ *Suydam v. Beals*, 4 McLean, 12, 15; *Hale v. Cont. Life Ins. Co.*, 20 Fed. R. 344.

⁶ *Hale v. Cont. Life Ins. Co.*, 20 Fed. R. 344.

⁷ *Suydam v. Beals*, 4 McLean, 12, 15; *Trust & Fire Ins. Co. v. Jenkins*, 8 Paige, (N. Y.) 589, 593, 594; *Hawkins v. Crook*, 2 P. Wms. 559.

⁸ Compare the positive language of Equity Rule 18, with *Mills v. Dennis*, 3 J. Ch. (N. Y.) 367; *O'Hara v. MacConnell*, 93 U. S. 151.

⁹ *O'Hara v. MacConnell*, 93 U. S. 151.

¹⁰ *Mills v. Dennis*, 3 J. Ch. (N. Y.) 367.

§ 104. **Practice in Taking a Bill pro confesso.**—The practice when a bill is taken *pro confesso* can be most satisfactorily described in the following quotations from the Equity Rules, and from a recent opinion by Mr. Justice Bradley.¹ When a defendant fails to plead in time, “the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.”² No service need be made of the order taking the bill *pro confesso*.³ “When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*; and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown, upon motion and affidavit of the defendant; and no such motion shall be granted unless upon payment of the costs of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.”⁴ After the term, a decree taking a bill as confessed cannot be set aside on motion.⁵ “A confession of facts properly pleaded dispenses with proof of these facts, and is as effective for the purposes of the suit as if the facts were proved;

§ 104. ¹ Thomson v. Wooster, 114 U. S. 104.

³ Bank of the United States v. White, 8 Pet. 262.

² Rule 18. See Read v. Consequa, 4 Wash. 174; O'Hara v. MacConnell, 93 U. S. 150, 152.

⁴ Rule 19. See Maynard v. Pomfret, 3 Atk. 468; Heyn v. Heyn, Jacob, 49.

⁵ Allen v. Wilson, 21 Fed. R. 881.

and a decree *pro confesso* regards the statements of the bill as confessed. By the early practice of the civil law, failure to appear at the day to which the cause was adjourned was deemed a confession of the action, but in later times this rule was changed, so that the plaintiff, notwithstanding the contumacy of the defendant, only obtained judgment in accordance with the truth of the case as established by an *ex parte* examination. Keller, Proceed. Rom. § 69. The original practice of the English Court of Chancery was in accordance with the later Roman law. *Hawkins v. Crook*, 2 P. Wms. 556. But for at least two centuries past bills have been taken *pro confesso* for contumacy. *Ibid.* Chief Baron Gilbert says: ‘Where a man appears by his clerk in court, and after lies in prison, and is brought up three times in court by *habeas corpus*, and has the bill read to him, and refuses to answer, such public refusal in court does amount to a confession of the whole bill. Secondly, when a person appears and departs without answering, and the whole process of the court has been awarded against him after his appearance and departure, to the sequestration; there also the bill is taken *pro confesso*, because it is presumed to be true when he has appeared and departs in despite of the court, and withstands all its process without answering.’ Forum Romanum, 36. Lord Hardwicke likened a decree *pro confesso* to a judgment by *nil dicit* at common law, and to judgment for plaintiff on demurrer to the defendant’s plea. *Davis v. Davis*, 2 Atk. 21. It was said in *Hawkins v. Crook*, *qua supra*, and quoted in 2 Eq. Ca. Ab. 179, that ‘the method in equity of taking a bill *pro confesso* is consonant to the rule and practice of the courts at law, where, if the defendant makes default by *nil dicit*, judgment is immediately given in debt, or in all cases where the thing demanded is certain: but where the matter sued for consists in damages, a judgment interlocutory is given; after which a writ of inquiry goes to ascertain the damages, and then the judgment follows.’ The strict analogy of this proceeding in actions of law to a general decree *pro confesso* in equity in favor of the complainant, with a reference to a master to take a necessary account, or to assess unliquidated damages, is obvious and striking. A carefully prepared history of the practice and effect of taking bills *pro confesso* is given in *Williams v. Corwin*, Hopkins Ch. 471, by Hoffman, Master, in a report made to Chancellor Sanford, of New York, in which the

conclusion come to (and adopted by the Chancellor), as to the effect of taking a bill *pro confesso*, was that 'when the allegations of a bill are distinct and positive, and the bill is taken as confessed, such allegations are taken as true without proofs,' and a decree will be made accordingly; but 'where the allegations of a bill are indefinite, or the demand of the complainant is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proofs. The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of details, the obligation to furnish proofs rests on the complainant.'" ⁶ When the bill relates to an unsettled account, a reference to a master is always necessary.⁷ "We may properly say, therefore, that to take a bill *pro confesso* is to order it to stand as if its statements were confessed to be true; and that a decree *pro confesso* is a decree based on such statements, assumed to be true, 1 Smith's Ch. Pract. 153, and such a decree is as binding and conclusive as any decree rendered in the most solemn manner. It cannot be impeached collaterally, but only upon a bill of review, or [a bill] to set it aside for fraud."⁸ "A decree *pro confesso* is not a decree as of course according to the prayer of the bill, nor merely such as the complainant chooses to take it;" ⁹ but it should be made "by the court according to what is proper to be decreed upon the statements of the bill assumed to be true;" ¹⁰ "the matter of the bill ought at least to be opened and explained to the court when the decree is applied for, so that the court may see that the decree is a proper one. The binding character of the decree, as declared in Rule 19, renders it proper that this degree of precaution should be taken."¹¹ "We have deemed it unnecessary to make any remarks as to the *status* of a defendant before a master on a reference under a decree *pro confesso*. Both parties in this case seem to have taken it for granted that the

⁶ Mr. Justice Bradley in *Thomson v. Wooster*, 114 U. S. 104, 110, 111.

⁷ *Pendleton v. Evans*, 4 Wash. 391.

⁸ Mr. Justice Bradley in *Thomson v. Wooster*, 114 U. S. 104, 112.

⁹ Mr. Justice Bradley in *Thomson v. Wooster*, 114 U. S. 104, 111, 112.

¹⁰ Mr. Justice Bradley in *Thomson v. Wooster*, 114 U. S. 104, 113; *Andrews v. Cole*, 20 Fed. R. 410; *Rose v. Woodruff*, 4 J. Ch. (N. Y.) 547, 548.

¹¹ Mr. Justice Bradley in *Thomson v. Wooster*, 114 U. S. 104, 113, 114.

rights of the defendants were the same as if the decree had been made upon answer and proofs. In the English practice, it is true, as it existed at the time of the adoption of our present Rules (in 1842), the defendant, after a decree *pro confesso* and a reference for an account, was entitled to appear before the master, and to have notice of and take part in the proceedings, provided he obtained an order of the court for that purpose, which would be granted on terms. 2 Daniell Ch. Pr. 804, 1st ed.; ditto, 1358, 2d ed., by Perkins; *Heyn v. Heyn*, Jacob, 49. The former practice in the Court of Chancery of New York was substantially the same. 1 Hoffman Ch. Pr. 520; 1 Barb. Ch. Pr. 479. In New Jersey, except in plain cases of decree for the foreclosure of a mortgage (where no reference is required), the matter is left to the discretion of the court. Sometimes notice is ordered to be given to the defendant to appear before the master, and sometimes not; as it is also in the Chancellor's discretion to order a bill to be taken *pro confesso* for a default, or to order the complainant to take proofs to sustain the allegations of the bill. Nixon Dig., Art. Chancery, § 21; Gen. Orders in Chancery, XIV. 3-7, *Brundage v. Goodfellow*, 4 Halst. Ch. 513. As we have seen, by our 18th Rule in Equity, it is provided that if a defendant make default in not filing his plea, demurrer, or answer in proper time, the plaintiff may, as one alternative, enter an order, as of course, that the bill be taken *pro confesso*, 'and thereupon the same shall be proceeded *ex parte*.' The old Rules, adopted in 1822, did not contain this *ex parte* clause; they simply declared that if the defendant failed to appear and file his answer within three months after appearance day, the plaintiff might take the bill for confessed, and that the matter thereof should be decreed accordingly; the decree to be absolute unless cause should be shown at the next term. See Equity Rules VI. and X. of 1822, 7 Wheat. VII., and *Pendleton v. Evans*, 4 Wash. C. C. R. 336; *O'Hara v. MacConnell*, 93 U. S. 159. Under these rules the English practice was left to govern the subsequent course of proceeding, by which, as we have seen, the defendant might have an order to permit him to appear before the master, and be entitled to notice. Whether under the present rule a different practice was intended to be introduced is a question which it is not necessary to decide in this case."¹² It has, however,

¹² Mr. Justice Bradley in *Thomson v. Wooster*, 114 U. S. 104, 119, 120.

been held in the second circuit, that "Equity Rule 18 provides that, after the order *pro confesso*, the cause shall proceed *ex parte*; but this does not mean without notice to a party who has appeared in the cause. Such party is entitled to notice, and has the right to be heard as to the form of the decree, and upon such other questions as can be presented upon the complainant's pleadings and proofs. This is the uniform construction given to the Rule throughout this circuit."¹³ Where a bill for the infringement of a patent alleges infringement of "the invention" of the plaintiffs, and is taken as confessed, it seems that it cannot be claimed in subsequent proceedings in the same suit that the patent is void upon its face.¹⁴ When there are more than one defendant who are charged with a joint liability, after the bill has been taken as confessed against one, no final decree can be made against him, unless and until a decree is entered against those who appear and defend the suit.¹⁵ It seems that a decree taking a bill as confessed is of no effect unless followed by, or included in a final decree.¹⁶ The entry of a final decree by default upon notice to the defendants, without the previous entry of a formal order taking the bill as confessed, is an irregularity for which the decree cannot be set aside upon motion after the term at which it is rendered.¹⁷ But a decree entered *pro confesso* will be set aside upon motion at a subsequent term, when entered before the time allowed the defendant by the rules to plead to the bill.¹⁸ An appeal can be taken from the final decree after a bill has been taken as confessed.¹⁹ Upon such an appeal the decree may be reversed for a defect in the service of the subpoena,²⁰ for failure to appoint a guardian *ad litem* when required,²¹ and it seems for a want of indispensable parties.²² Otherwise, the only question for the consideration of the court is whether the allegations in the bill are sufficient to support the decree.²³ It seems that the objection that the complainant has an adequate remedy at law may

¹³ Judge Wallace in *Bennett v. Hoefner*, 17 Blatchf. 341, 342.

¹⁴ *Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 446, 447.

¹⁵ *Frow v. De La Vega*, 15 Wall. 552.

¹⁶ *Lockhart v. Horn*, 3 Woods, 542, 548.

¹⁷ *Linder v. Lewis*, 1 Fed. R. 378.

¹⁸ *Fellows v. Hall*, 3 McLean, 281.

¹⁹ *Frow v. De La Vega*, 15 Wall. 552; *Butterworth v. Hill*, 114 U. S. 128.

²⁰ *O'Hara v. MacConnell*, 93 U. S. 150; *Butterworth v. Hill*, 114 U. S. 128.

²¹ *O'Hara v. MacConnell*, 93 U. S. 150.

²² *O'Hara v. MacConnell*, 93 U. S. 150.

²³ *Masterson v. Howard*, 18 Wall. 99; *Ohio C. R. R. Co. v. Central Trust Co.*, 133 U. S. 83.

be disregarded by the appellate court.²⁴ When the defendant had not moved for nine months after the appointment of a receiver, and meanwhile the bill had been taken against him as confessed, it was held too late to claim that no relief could be granted, because the complainant had an adequate remedy at law.²⁵

²⁴ *Brown v. Lake Superior Iron Co.*,
134 U. S. 530.

²⁵ *Brown v. Lake Superior Iron Co.*,
134 U. S. 530.

CHAPTER VIII.

DEMURRERS.

§ 105. Definition and General Characteristics of a Demurrer. —

A demurrer is a pleading which admits the truth of a bill, but claims that the defendant should be excused from answering thereto and the complainant be denied relief on account of some irregularity or insufficiency existing in it. As the name denotes, demurrers were borrowed from the common law.¹ They are so termed because the defendant *demoratur*, or will go no farther.² A speaking demurrer is one that introduces a new fact or averment which is necessary to support the demurrer, and does not appear distinctly on the face of the bill.³ Such a demurrer is always bad, and will be overruled.⁴ But in order to constitute a speaking demurrer, the fact or averment introduced must be one which is necessary to support the demurrer and is not found in the bill: the introduction of *immaterial* facts, or averments, or of arguments, is improper, but constitutes mere surplusage and will not vitiate the demurrer.⁵ A demurrer is also bad if it relies for its support upon averments in an answer.⁶ A demurrer must not be addressed to a point within the discretion of the court; if so, it will be overruled.⁷ It has been held, that when the bill shows that a defendant is not an inhabitant of the district that defect may be raised by demurrer.⁸ A demurrer cannot be filed to an answer.⁹

§ 106. Admissions by a Demurrer. — A demurrer admits the

§ 105. ¹ Langbeil's Eq. Pl. §§ 53, 92.

² Daniell's Ch. Pr. (5th Am. ed.) 543; 3 Bl. Com. 314.

³ Edsell v. Buchanan, 4 Brown Ch. C. 254; Davies v. Williams, 1 Simons, 5, 7; Lamb v. Starr, Deady, 350; Daniell's Ch. Pr. (2d Am. ed.) 656, note 2; Story's Eq. Pl. § 448.

⁴ Edsell v. Buchanan, 4 Brown Ch. C. 254; Story's Eq. Pl. § 448; Daniell's Ch. Pr. (2d Am. ed.) 656, note 2.

⁵ Daniell's Ch. Pr. (2d Am. ed.) 657; Cawthorn v. Chalie, 2 Sim. & S. 127; Davies v. Williams, 1 Simons, 5.

⁶ Chicago, St. Louis & New Orleans R. R. Co. v. Macomb, 2 Fed. R. 18.

⁷ Verplank v. Caines, 1 J. Ch. (N. Y.) 57.

⁸ Reinstadler v. Rehls, 33 Fed. R. 308; Miller Magee Co. v. Carpenter, 34 Fed. R. 433. But see § 101.

⁹ Crouch v. Kerr, 38 Fed. R. 549.

truth of the allegations of fact in the bill.¹ "As a matter of construction of an ambiguous clause, the court is bound to adopt that interpretation which is least favorable to the plaintiff; but the defendant is not entitled to press this principle so far as to draw any inferences of fact he pleases which may happen to be not inconsistent with the averments of the bill."² It has been said that "reasonable presumptions are admitted by demurrer as well as the matters expressly alleged."³ The court will not infer from an allegation, that a fraud was committed at a time beyond the limit of the Statute of Limitations, that the fraud was then discovered.⁴ "A demurrer only admits facts well pleaded; it does not admit matters of inference and argument, however clearly stated; it does not admit, for example, the accuracy of an alleged construction of an instrument, when the instrument itself is set forth in the bill, or a copy is annexed, against a construction required by its terms, nor the correctness of the ascription of a purpose to the parties when not justified by the language used. The several averments of the plaintiff in the bill as to his understanding of his rights, and of the liabilities and duties of others under the contract, can, therefore, exert no influence upon the mind of the court in the disposition of the demurrer."⁵ "Though the authorities are by no means unanimous, the weight of opinion is in favor of the proposition that where *profert* is made of a recorded paper it is for all purposes presented to the court as a part of the pleading, and an objection thereto may be taken by demurrer."⁶ A demurrer does not admit conclusions of law; and in the construction of the bill upon the argument they may

§ 106. ¹ *Bailey v. Birkenhead, Lancashire & Cheshire Junction Ry. Co.*, 12 Beav. 433, 443; *Pacific R. R. of Missouri v. Missouri Pacific Ry. Co.*, 111 U. S. 505, 522; *Boyer v. Boyer*, 113 U. S. 689, 701.

² *Sir Page Wood, V. C.*, in *Simpson v. Fogo*, 1 J. & H. 18, 23; s. c. 6 Jurist n. s. 949. See *Union Pac. Ry. Co. v. Mercer*, 28 Fed. R. 9.

³ *Mr. Justice Clifford in Amory v. Lawrence*, 3 Clifford, 523, 536.

⁴ *Sheldon v. Keokuk No. Line Packet Co.*, 8 Fed. R. 769, 777; *Johnson v. Powers*, 13 Fed. R. 315; *Jones v. Slawson*, 33 Fed. R. 632, 636.

⁵ *Mr. Justice Field in Dillon v. Bar-*

nard, 21 Wall. 430, 437, 438. See also s. c. 1 Holmes, 386; *United States v. Ames*, 99 U. S. 35, 45; *Cornell v. Green*, 43 Fed. R. 105, 107; *Interstate Land Co. v. Maxwell Land Co.*, 139 U. S. 569.

⁶ *Coxe, J.*, in *Bogart v. Hinds*, 25 Fed. R. 484, citing *Knott v. Burleson*, 2 G. Greene (Iowa), 600; *Wilder v. McCormick*, 2 Blatchf. 31, 35; *Grahame v. Cooke*, 1 Cranch C. C. 116; *Douglass v. Rathbone*, 5 Hill (N. Y.), 143; *Rantin v. Robertson*, 2 Strobb. Law (S. C.), 366; 1 Chitty's Pl. 415, 416. So held of patents and reissued patents by *Coxe, J.*, in *International Terra Cotta Lumber Co. v. Maurer*, 44 Fed. R. 618, 619.

be disregarded.⁷ Such, for example, are the allegations that a tax is "unreasonable and excessive," without the statement of any valid reasons for so considering it;⁸ that a fee charged by an ordinance styling it wharfage "is not real wharfage, but a duty on tonnage."⁹ "The words 'fraud' and 'conspiracy' alone, no matter how often repeated in a pleading, cannot make a case for the interference of a court of equity. Until connected with some specific acts for which one person is in law responsible to another they have no more effect than other words of unpleasant signification."¹⁰ The words "fraudulently," "deceitfully," and "by mistake" are conclusions of law, and will be disregarded.¹¹ Averments that what was done was "colorable," "a fraud," "a breach of trust," and "a scheme by which Blair and Taylor were to get" certain stock or shares of stock in a corporation "without paying for them," are allegations of conclusions of law, which a demurrer does not admit.¹² An averment that a thing was done with the intent to defraud is an allegation of fact.¹³ A demurrer does not admit a false allegation concerning a fact of which the court will take judicial notice.¹⁴ An allegation as to the future effect of an act threatened by the defendant will, however, be admitted by a demurrer.¹⁵

§ 107. **Demurrers to Parts of Bills.** — A demurrer may be to the whole, or to a part of a bill,¹ or to both the whole and separate parts of a bill.² Separate demurrers may be filed for different causes to separate parts of a bill.³ If only a part of the bill be demurred to, the demurrer must be accompanied by a plea or answer to what remains.⁴ The defendant may demur to part, plead to part, and answer as to the residue.⁵ Such a mode of pleading

⁷ *Dillon v. Barnard*, 21 Wall. 430; *Wilson v. Gaines*, 103 U. S. 417; *Packet Company v. Catlettsburg*, 105 U. S. 559; *Transportation Company v. Parkersburg*, 107 U. S. 691; *Louisville & Nashville R. R. Co. v. Palmes*, 109 U. S. 244.

⁸ *Packet Company v. Catlettsburg*, 105 U. S. 559.

⁹ *Transportation Company v. Parkersburg*, 107 U. S. 691.

¹⁰ Chief Justice Waite in *Ambler v. Choteau*, 107 U. S. 586, 591. For allegations held sufficient, see *Pacific R. R. of Mo. v. Missouri Pacific Ry. Co.*, 111 U. S. 505.

¹¹ *Magniac v. Thompson*, 2 Wall. Jr. 209.

¹² *Fogg v. Blair*, 139 U. S. 118, 127.

¹³ *Platt v. Mead*, 9 Fed. R. 91.

¹⁴ *Taylor v. Barclay*, 2 Simons, 213. Compare *Louisville & Nashville R. R. Co. v. Palmes*, 109 U. S. 244, 252.

¹⁵ *St. Louis v. Knapp Company*, 104 U. S. 658.

§ 107. ¹ Rule 32.

² *International Terra Cotta Lumber Co. v. Marner*, 44 Fed. R. 621.

³ *North v. Earl of Strafford*, 3 P. Wms. 148; *Roberdeau v. Rous*, 1 Atk. 544; *Daniell's Ch. Pr.* (5th Am. ed.) 584.

⁴ See *Story's Eq. Pl.* § 442; *Daniell's Ch. Pr.* (5th Am. ed.) 583.

⁵ Rule 32.

is now, however, very rare ; for the same defenses can usually be embraced with more convenience and safety in an answer.⁶ “ If a demurrer is too general, that is, if it covers, or is applied to the whole bill, when it is good to a part only ; or if it is a demurrer to a part of a bill only, but yet is not good to the full extent which it covers, but is so to a part only, it will be overruled ; for it is a general rule that a demurrer (it is otherwise as to a plea) cannot be good as to a part which it covers, and bad as to the rest, and therefore it must stand or fall altogether.”⁷ The court may, however, allow the defendant to amend his demurrer upon narrowing its terms.⁸ It has been held at circuit that an objection to an immaterial allegation in a bill should be taken by exception and not by demurrer.⁹ The equity rules, changing the former practice, now provide that “ no demurrer or plea shall be overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.”¹⁰ Formerly, when a defendant filed a plea or answer to the same part of a bill as he demurred to, he was held to have waived his demurrer, which would be overruled by the court.¹¹ But a demurrer by one defendant was not overruled by a plea or answer filed by another.¹² Now, however, the rules declare that “ no demurrer or plea shall be held bad, and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by the demurrer or plea.”¹³ It has been held, under this rule, that a demurrer to the whole bill is not overruled by a plea or answer :¹⁴ but the defendant may be compelled upon motion to elect between such a de-

⁶ Rule 39.

⁷ Story's Eq. Pl. § 443; *Metcalf v. Hervey*, 1 Ves. Sen. 248; *Verplank v. Caines*, 1 J. Ch. (N. Y.) 57; *Higginbotham v. Burnet*, 5 J. Ch. (N. Y.) 184; *Atwill v. Ferrett*, 2 Blatchf. 39; *Brandon Manuf. Co. v. Prime*, 14 Blatchf. 371; s. c. 3 Bann. & A. Pat. Cas. 191; *Heath v. Erie Ry. Co.*, 8 Blatchf. 347; *Equitable Life Ass. Soc. v. Patterson*, 1 Fed. R. 126.

⁸ *Baker v. Mellish*, 11 Ves 70; *Gregg v. Legh*, 4 Madd. 192, 207; *Atwill v. Ferrett*, 2 Blatchf. 39, 49; *Northern Pac. R. Co. v. Roberts*, 42 Fed. R. 734.

⁹ *Stonemetz P. M. Co. v. Brown F. M. Co.* 46 Fed. R. 72; *Stirratt v. Excelsior Manuf. Co.*, 44 Fed. R. 142.

¹⁰ Rule 36, which follows the 36th Order in Chancery of August, 1841. See, however, *Dell v. Hale*, 2 Y. & C. N. R. 1; *Atwill v. Ferrett*, 2 Blatchf. 39; *Heath v. Erie Ry. Co.*, 8 Blatchf. 347; *Brandon Manuf. Co. v. Prime*, 14 Blatchf. 371; s. c. 3 Bann. & A. Pat. Cas. 191; *Equitable Life Ass. Soc. v. Patterson*, 1 Fed. R. 126.

¹¹ Story's Eq. Pl. § 443; *Dawson v. Sadler*, 1 Sim. & S. 537, 542; *Langdell's Eq. Pl.* § 103.

¹² *Dakin v. Union Pacific Ry. Co.*, 5 Fed. R. 665.

¹³ Rule 37.

¹⁴ *Hayes v. Dayton*, 8 Fed. R. 702, 706. *Contra*, *Crescent City Live Stock Co. v. Butchers' Union Live Stock Co.*, 12 Fed.

murrer and the answer or plea;¹⁵ and if he elect to stand by his demurrer, it seems that he will thereby waive his right to answer should his demurrer be overruled.¹⁶ By proceeding to an argument of the demurrer, an objection of this nature will be waived.¹⁷ The English courts have held, that a defendant cannot answer to the relief of a bill and demur to the discovery, unless he can rest his demurrer upon one of the recognized grounds on account of which a witness is always excused from answering.¹⁸ A demurrer which is good as to the relief will also bar the discovery; although if the bill be good for discovery but not for relief, the defendant does not prejudice a demurrer filed by him to the relief by answering as to the discovery.¹⁹ A demurrer which is good as to the discovery need not be good as to the relief.²⁰

§ 108. **Classification of Demurrers to the Relief.** — Demurrers to the relief claim that for some reason apparent upon the face of the bill the plaintiff is not entitled to the relief prayed for in it. They are classified by Mitford, afterwards Lord Redesdale, substantially as follows.¹ Demurrers to the relief are founded on objections to the jurisdiction; to the person; or to the matter of the bill, either in substance or in form. Demurrers to the jurisdiction are allowed either (1) because the subject of the suit is not within the jurisdiction of a court of equity; or (2) because some other court of equity has the proper jurisdiction. A demurrer of this last class is much more frequent now than formerly. For the rule, that in a superior court of general jurisdiction the presumption is that nothing shall be intended out of its jurisdiction that is not shown or intended to be so,² does not apply to the courts of the United States, whose jurisdiction is confined to what is expressly given them by the Constitution and statutes;

R 225; *Adams v. Howard*, 21 Off. Gaz. 264; s. c. 9 Fed. R. 347.

¹⁵ *Adams v. Howard*, 21 Off. Gaz. 264; s. c. 9 Fed. R. 347. See *United States v. Am. Bell Telephone Co.*, 30 Fed. R. 523.

¹⁶ *Adams v. Howard*, 21 Off. Gaz. 264; s. c. 9 Fed. R. 347; *Orendorf v. Budlong*, 12 Fed. R. 24.

¹⁷ *Hayes v. Dayton*, 8 Fed. R. 702, 706.

¹⁸ *Deed v. Hale*, 2 Y. & C. N. R. 1; *Brownword v. Edwards*, 2 Ves. Sen. 243; *Daniell's Ch. Pr.* (2d Am. ed.) 605-607.

¹⁹ *Daniell Ch. Pr.* (2d Am. ed.) 604,

605; *Langdell's Eq. Pl.* § 103; *Story's Eq. Pl.* § 312; *Rules* 36, 37; *Jeffreys v. Baldwin*, Amb. 164; *Hodgkin v. Longden*, 8 Ves. 2; *Todd v. Gee*, 17 Ves. 273; *French v. Hay*, 22 Wall. 250.

²⁰ *Atwill v. Ferrett*, 2 Blatchf. 39, 43; *Heath v. Erie Ry. Co.*, 8 Blatchf. 348; *Farmer v. Calvert Lith. Co.*, 1 Flippin, 228.

§ 108. ¹ *Mitford's Pl. ch.* 11, § 2.

² *Daniell's Ch. Pr.* (2d Am. ed.) 615; *Earl of Derby v. Duke of Athol*, 1 Ves. Sen. 203.

and must always appear upon the record.³ It has been held that the objection that one of two plaintiffs suing to enforce a common, not a joint right, is a citizen of the same State as a defendant, cannot be raised by a demurrer to the whole bill.⁴ Causes of demurrer to the person are, that it appears upon the face of the bill that the plaintiff has not the legal capacity to sue, — either at all, as an alien enemy, or an unincorporated association suing as a corporation; or alone, as an infant, idiot, lunatic, and in some States a married woman.⁵ Demurrers to the substance of a bill are that it appears upon the face of the bill: (1) That the plaintiff has no interest in the subject-matter of the bill. It has been held that the objection that one of two plaintiffs has no interest in the subject-matter can be raised by a general demurrer for want of equity.⁶ (2) That the defendant is not answerable to him, but to some other person. (3) That the defendant has no interest in the subject-matter of the suit. (4) That the plaintiff is not entitled to the relief he prays; but if the bill show a case for some relief, and yet ask for too much or the wrong relief, it is not demurrable, provided it contain the prayer for general relief.⁷ (5) That the value of the subject-matter is beneath the dignity of the court. In England the Court of Chancery declined to interfere when the value of the matter in dispute was less than ten pounds, except in suits brought by or on behalf of charities, under bills to obtain relief on account of fraud, or to establish a right.⁸ In the Circuit Courts of the United States the bill should show affirmatively that the matter in dispute exceeds two thousand dollars,⁹ except in certain cases for which the statutes specially provide.¹⁰ (6) That the bill does not embrace the whole matter concerning which the suit is brought, and which is capable of being immediately disposed of, so that there is danger of the defendant's being harassed with other suits about the same.¹¹

³ *Turner v. Bank of North America*, 4 Dall. 8; *Godfrey v. Terry*, 97 U. S. 171.

⁴ *Nebraska City National Bank v. Nebraska City Hydraulic Gas Light Co.*, 14 Fed. R. 763. But see *Hodge v. North Missouri R. R. Co.*, 1 Dill. 104.

⁵ See Chapter II.

⁶ *Hodge v. North Missouri R. R.*, 1 Dillon, 104. But see *Nebraska City National Bank v. Nebraska City Hydraulic Gas Light Co.*, 14 Fed. R. 763.

⁷ *Patrick v. Isenhardt*, 20 Fed. R. 339;

Whitbeck v. Edgar, 2 Barb. Ch. (N. Y.) 106.

⁸ *Daniell's Ch. Pr.* (2d Am. ed.) 378, 379; *Brace v. Taylor* 2 Atk. 253; *Moore v. Lyttle*, 4 J. Ch. (N. Y.) 183.

⁹ *United States v. Pratt Coal & Coke Co.*, 18 Fed. R. 708; 24 St. at L. ch. 373. But see *Sharon v. Terry*, 36 Fed. R. 337.

¹⁰ See §§ 15, 16.

¹¹ *Anon.*, 2 Chancery Cases, 164; *Purefoy v. Purefoy*, 1 Vern. 29; *Shuttleworth*

(7) That there is a want of proper parties, plaintiff or defendant.¹² (8) That there is a misjoinder¹³ of parties plaintiff. A superfluity of defendants, not accompanied by multifariousness, is the subject of objection by those only who were improperly joined.¹⁴ (9) That the plaintiff's remedy is barred by length of time or laches.¹⁵ When a bill praying an injunction to restrain the infringement of a reissued patent sets out or exhibits both the original and the reissued patent, and it appears from inspection that the sole object of the reissue was to enlarge and expand the claims of the original, and that a delay of two or three years has taken place in applying for the reissue, not explained by special circumstances giving sufficient ground for the delay, the question of laches is a question of law arising on the face of the bill, which avails as a defence, upon a general demurrer for want of equity.¹⁶ If it appears by the face of the bill that the case of the complainant is barred by the statute of limitations, it is demurrable.¹⁷ A demurrer will also be sustained where the bill shows that the plaintiff's case is repugnant to the statute of frauds.¹⁸ (10) That the bill is multifarious.¹⁹ It has been held that only such defendants as would suffer by the multifariousness can raise this objection.²⁰ Or (11) that there is another suit pending between the parties for the same cause of action. Demurrers for insufficiency as to form are either: (1) That the plaintiff's place of abode is not stated; or that a compliance has not been made with any of the other requisites of Rule 20.²¹ (2) That the facts essential to the plaintiff's

v. Laycock, 1 Vern. 245; *Margrave v. Le Hooke*, 2 Vern. 207.

¹² *Dwight v. Central Vt. R. R. Co.*, 9 Fed. R. 785.

¹³ *Walker v. Powers*, 104 U. S. 245; *Lansdale v. Smith*, 106 U. S. 391; *Taylor v. Holmes*, 14 Fed. R. 498; *Markey v. Mutual Benefit Life Ins. Co.*, 6 Ins. L. J. 537; *Wollensak v. Reiher*, 115 U. S. 96.

¹⁴ *Cherrey v. Monro*, 2 Barb. Ch. (N. Y.) 618; *Toulmin v. Hamilton*, 7 Ala. 362. But see *Bank v. Carrollton R. R.*, 11 Wall. 624.

¹⁵ *Maxwell v. Kennedy*, 8 How. 210; *Badger v. Badger*, 2 Wall. 87, 94; *Marsh v. Whitmore*, 21 Wall. 185; *Sullivan v. Portland & K. Railroad Company*, 94 U. S. 806; *Brown v. County of Buena Vista*, 95 U. S. 161; *Godden v. Kimmell*, 99 U. S. 201; *National Bank v. Carpenter*, 101 U. S. 567.

¹⁶ *Wollensak v. Reiher*, 115 U. S. 96, 101.

¹⁷ *Godden v. Kimmell*, 99 U. S. 201; *National Bank v. Carpenter*, 101 U. S. 567; *Wisner v. Barnet*, 4 Wash. 631. But see *Sullivan v. Portland & Kennebec R. R. Co.*, 94 U. S. 806, 811; *Doe v. Hyde*, 114 U. S. 247; *Philippi v. Philippe*, 115 U. S. 151.

¹⁸ *Randall v. Howard*, 2 Black, 585, 589. But see *Chapman v. School District*, 1 Deady, 108.

¹⁹ See §§ 71-75.

²⁰ *Atwill v. Ferrett*, 2 Blatchf. 39, 44, *Buerk v. Imhaeuser*, 8 Fed. R. 457; *Hill v. Bonaffon*, 2 Weekly Notes of Cases (Pa.), 356.

²¹ *Mitford's Pl. ch. 2, § 2*; *Rowley v. Eccles*, 1 Sim. & S. 511.

right and within his own knowledge are not alleged positively.²² (3) That the bill is deficient in certainty.²³ (4) That the plaintiff does not in his bill offer to do equity, when it is the custom of the court to require him to do so.²⁴ (5) That the bill is not signed by counsel.²⁵ (6) That the bill is not supported by an affidavit when one is necessary.²⁶ A demurrer to the relief will not lie upon the ground that the bill contains irrelevant matter. The proper remedy for this is an exception for impertinence.²⁷ Neither is a bill demurrable because indispensable parties, whom it names and against whom it prays process, have not been served with subpoenas to appear and answer.²⁸ If any part of the relief prayed is proper the demurrer will be overruled.²⁹

§ 109. *Demurrers to the Discovery.* — A demurrer to the discovery claims that, for some reason apparent upon the face of the bill, the defendant should not be obliged to answer so much thereof as his demurrer covers. Professor Langdell says: "A demurrer to discovery indeed is not in its nature a demurrer at all, but a mere statement in writing that the defendant refuses to answer certain allegations in the bill, for reasons which appear upon the face of the bill, and which the demurrer points out."¹ A defendant may thus demur because (1) his answer may subject him to a pain, penalty, or forfeiture;² (2) that it is immaterial to the purposes of the suit;³ (3) that it would involve a breach of some confidence which it is the policy of the law to preserve inviolate,⁴ as a professional confidence,⁵ or one obtained in the course of a public office;⁶ (4) that the matters of which

²² Mitford's Pl. ch. 2, § 2; Daniell's Ch. Pr. 412, 625.

²³ Taylor v. Holmes, 14 Fed. R. 498; Goldsmith v. Gilliland, 22 Fed. R. 865.

²⁴ United States v. Pratt Coal & Coke Co., 18 Fed. R. 708. See § 82.

²⁵ Rule 24; Dwight v. Humphreys, 3 M'Lean, 104.

²⁶ Findlay v. Hinde, 1 Pet. 241, 244.

²⁷ Pacific Railroad of Missouri v. Missouri Pacific Railway Co., 111 U. S. 505, 522; Rule 26.

²⁸ Kilgour v. New Orleans Gas Light Co., 2 Woods, 145.

²⁹ Chicago M. & St. P. Ry. Co. v. Hartshorn, 30 Fed. R. 541; Town of Strawberry Hill v. Chicago M. & St. P. Ry. Co., 41 Fed. R. 568.

§ 109. ¹ Langdell's Eq. Pl. § 97.

² Stewart v. Drasha, 4 M'Lean, 563; Atwill v. Ferrett, 2 Blatchf. 39; United States v. White, 17 Fed. R. 561, 565; Paxton v. Douglas, 19 Ves. 225; Story's Eq. Pl. §§ 575-599.

³ Harvey v. Morris, Rep. temp. Finch, 214; Daniell's Ch. Pr. (2d Am. ed.) 636, 637. But see Pacific Railroad of Missouri v. Missouri Pacific Railway Co., 111 U. S. 505, 522.

⁴ Story's Eq. Pl. § 547.

⁵ Greenough v. Gaskell, 1 Myl. & K. 100; Story's Eq. Pl. § 547, and cases cited.

⁶ Smith v. East India Co., 1 Phillips, 50; Attorney-General v. London, 12 Beav. 8; Worthington v. Scribner, 109 Mass. 487, 493.

a discovery is sought pertain exclusively to the defendant's case;⁷ (5) according to the old rule, because the defendant has, "in conscience, a right equal to that claimed by a person filing a bill against him, though not clothed with a perfect legal title,"⁸ as, if he be a purchaser in good faith, and for a valuable consideration, without any notice of the plaintiff's claim.⁹ Where the complainant is the only person who can insist upon the penalty or forfeiture, and he waives it in his bill, he may compel a discovery.¹⁰ In certain cases, a defendant may be obliged to answer to a charge of a fraud which might subject him to a criminal prosecution.¹¹ An English case holds that a discovery can be compelled although a defendant might thereby admit his guilt of an offence against the criminal laws of a foreign country.¹² Demurrers to the discovery are now rarely filed. For the objections to the discovery do not usually appear upon the face of a bill; and when they do, it seems that, since the equity rules, they can now in all cases be taken by answer.¹³ A demurrer to an interrogatory that has been already answered cannot raise the question whether the answer to it is sufficient.¹⁴ The subject of discovery is of much less importance now than formerly; and the curious reader is therefore referred to the works of Wigram and Hare for a full discussion of it.

§ 110. Of what Defects Advantage should be taken by Demurrer. — Advantage can be taken of most defects in a bill by answer, as well as by demurrer. But objections to defects in the form of a bill, except possibly those which are required by the equity rules,¹ can only be raised by demurrer.² Such is an omission to allege that two defendants infringed a patent jointly.³

⁷ *Bolton v. Corporation of Liverpool*, 1 Myl. & K. 88; *Daniell's Ch. Pr.* (2d Am. ed.) 645-648.

⁸ *Daniell's Ch. Pr.* (2d Am. ed.) 635, 636.

⁹ *Jerrard v. Saunders*, 2 Ves. Jr. 454; *Gleage v. Leigh*, 4 Madd. 193; *Langdell's Eq. Pl.* § 188.

¹⁰ *Mason v. Lake*, 2 Brown, P. C. 495; *Lord Uxbridge v. Staveland*, 1 Ves. Sen. 56; *Atwill v. Ferrett*, 3 Blatchf. 39.

¹¹ *Dummer v. Corporation of Chippenham*, 14 Ves. 245, 251; *Story's Eq. Pl.* § 578; *Daniell's Ch. Pr.* (2d Am. ed.) 631, 632.

¹² *King of Two Sicilies v. Willcox*, 1

Simons N. S. 301. See also *United States of America v. McRae*, L. R. 4 Eq. 327; s. c. on appeal, L. R. 3 Ch. App. 79.

¹³ See *Rules* 39, 44.

¹⁴ *Chicago, St. Louis & New Orleans R. R. Co. v. Macomb*, 2 Fed. R. 18.

§ 110. ¹ See *National Bank v. Insurance Company*, 104 U. S. 54, 76.

² *Daniell's Ch. Pr.* (2d Am. ed.) 453; *Story's Eq. Pl.* §§ 453, 528; *Hook v. Dorman*, 1 Sim. & S. 227; *Crosse v. Beddingfield*, 12 Simons, 35; *Findlay v. Hinde*, 1 Pet. 244; *Fischer v. O'Shaughnessey*, 6 Fed. R. 92.

³ *Fischer v. O'Shaughnessey*, 6 Fed. R. 92; *Putnam v. Hollander*, 6 Fed. R. 882.

If the want of equity of the plaintiff's case be clearly apparent upon the face of the bill, an omission to demur may be a ground for refusing the defendant costs at the hearing.⁴ The objection that the plaintiff has an adequate remedy at law should be specifically raised in a demurrer, plea, or answer,⁵ although the court may for its own protection dismiss a bill for this at any stage of the proceedings.⁶

§ 111. **When a Demurrer should be Filed.** — "It shall be the duty of the defendant, unless his time shall be otherwise enlarged, for cause shown by a judge of the court upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may at his election enter an order (as of course) in the order-book that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer and is proper to be decreed."¹ The demurrer may be filed, even after the rule-day, at any time before an order has been entered directing that the bill be taken *pro confesso*,² or after such an order by leave of the court.³

§ 112. **Title of Demurrer.** — A demurrer is usually entitled substantially thus: "The demurrer of John Stiles to the bill of complaint of Richard Roe."¹ If accompanied by a plea or answer, or both, it should be called in the title "the demurrer and plea," or "the demurrer and answer," or "the demurrer, plea, and answer."² When it is to an amended bill, it need not be expressed in the title to be a demurrer to both the original and the amended bill; but if designated as a demurrer to the amended bill, that will be sufficient.³

§ 113. **Protestation.** — After the title formerly followed the clause, "This defendant, by protestation, not confessing all or

⁴ *Harland v. Bankers' & M. Tel. Co.*, 32 Fed. R. 305.

⁵ *Reynes v. Dumont*, 130 U. S. 354; *Kilburn v. Sunderland*, 130 U. S. 505; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530.

⁶ *Lewis v. Cockes*, 23 Wall. 466; *Oelrichs v. Spain*, 15 Wall. 211; *Reynes v. Dumont*, 130 U. S. 354, 395.

§ 111. ¹ Rule 18.

² Rule 32; *Oliver v. Decatur*, 4 Cranch C. C. 458.

³ Rule 32.

§ 112. ¹ *Daniell's Ch. Pr.* (2d Am. ed.) 652.

² *Daniell's Ch. Pr.* (2d Am. ed.) 652, 653.

³ *Daniell's Ch. Pr.* (2d Am. ed.) 653; *Smith v. Bryon*, 3 Madd. 428.

any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged."¹ This was a practice borrowed from the common law, and was probably intended to avoid conclusion in another suit;² but it is a needless form,³ and may well be omitted.

§ 114. **Statement of the Extent of the Demurrer.**—If a demurrer be not to the whole bill, it must clearly express those parts which it is designed to cover.¹ "And this must be done not by way of exception, as by demurring to all except certain parts of the bill, but by a positive definition of the parts to which the defendant seeks to avoid making any answer."² A special demurrer should point out specifically by paragraph, page, or folio, or in some other distinct form of reference, the parts of the bill to which it is intended to apply.³ When the bill was long, a special demurrer "to so much of the bill as seeks" certain relief, without further specifying the part demurred to, has been held bad.⁴ A demurrer may, however, be expressed as to the whole bill except to a specified part.⁵

§ 115. **Statement of Causes of Demurrer.**—By the English practice a demurrer was required to contain a statement of its causes, otherwise it would be overruled.¹ It is the safer practice for the pleader to comply with this. It was, however, said in a recent case: "The formal statement of causes of a demurrer, though usual, is not necessary. The assertion of a general demurrer is that the plaintiff has not, on his own showing, made out a case. If the causes of demurrer are not formally set forth the plaintiff may object, and require them to be thus stated."²

§ 113. ¹ Story's Eq. § 455, n. 3.

² Mitford's Pl. ch. 2, § 2; Taylor v. Holmes, 14 Fed. R. 498.

³ Story's Eq. Pl. § 452.

§ 114. ¹ Devonsher v. Newenham, 2 Sch. & Lef. 199; Chetwynd v. Lindon, 2 Ves. Sen. 450; Salkeld v. Science, 2 Ves. Sen. 107; Atwill v. Ferrett, 2 Blatchf. 39; Chicago, St. L. & N. O. R. R. Co. v. Macomb, 2 Fed. R. 18; Daniell's Ch. Pr. (2d Am. ed.) 653, 654; Story's Eq. Pl. §§ 457, 458.

² Story's Eq. Pl. § 457; Robinson v. Thompson, 2 Ves. & B. 118; Devonsher v. Newenham, 2 Sch. & Lef. 205.

³ Atwill v. Ferrett, 2 Blatchf. 39; Chicago, St. Louis, & N. O. R. R. Co. v. Macomb, 2 Fed. R. 18.

⁴ Atwill v. Ferrett, 2 Blatchf. 39.

⁵ Hicks v. Raineck, 1 Cox, 40; Howe v. Duppa, 1 Ves. & B. 511; Daniell's Ch. Pr. (2d Am. ed.) 654.

§ 115. ¹ Langdell's Eq. Pl. § 96; Sanders' Orders, 180, 223; Duffield v. Greaves, Cary, 125; Offeley v. Morgan, Cary, 153; Peachie v. Twyecrosse, Cary, 113; Daniell's Ch. Pr. (2d Am. ed.) 655.

² Taylor v. Holmes, 14 Fed. R. 498, 499; per Dick, D. J.

Demurrers are either general or special. They are general when no particular cause is assigned except the usual formulary, to comply with the rules of the court, that there is no equity in the bill.³ Such a one is called a demurrer for want of equity. They are special when the particular defects or objections are pointed out. The former will be sufficient, although special causes are usually stated, when the bill is defective in substance. The latter is indispensable when the objection is to the defects of the bill in point of form.⁴ But under a general demurrer a defendant may take advantage of a few objections which appear to be as to matters of form. Thus, under a demurrer for want of equity, the objection that a necessary affidavit is wanting, or that the plaintiff has not offered to do equity when that is required, may be raised.⁵ So, may a lack of sufficient positiveness in the statement of facts in the bill,⁶ and a misjoinder of plaintiffs by the addition of one with no interest in the subject of the bill.⁷ But it has been held that a general demurrer for want of equity will not cover an objection to the discovery only. That, it was said, must be made the subject of a special demurrer.⁸ A defendant may, however, in cases where he demurs to the substance of the bill, in which term is included an apparent defect of jurisdiction, state specially the different grounds upon which he founds his objection;⁹ and, indeed, some of these grounds of demurrer seem to require a more particular statement. Thus, a demurrer for want of parties should show who are the necessary parties that have been omitted, not necessarily by name, but in such a manner as to point out to the plaintiff the objections to his bill, so that he may amend by adding the proper parties.¹⁰ But it has been said that this rule does not apply where it appears from the face of the bill that the plaintiff has sufficient information as to the names, interests, and residences

³ Story's Eq. Pl. § 455; Langdell's Eq. Pl. § 95.

⁴ Story's Eq. Pl. § 455. See also Beames' Orders in Chancery, 77, 173; Mitford's Pl. ch. 2, § 2; Daniell's Ch. Pr. (2d Am. ed.) 655. But see Taylor v. Holmes, 14 Fed. R. 498, 499.

⁵ Daniell's Ch. Pr. (2d Am. ed.) 655.

⁶ Daniell's Ch. Pr. (2d Am. ed.) 655.

⁷ Hodge v. North Missouri R. R. Co., 1 Dill. 104.

⁸ Whittingham v. Burgoyne, 3 Anst. 900; Daniell's Ch. Pr. (2d Am. ed.) 656.

⁹ See, for example, the statement of causes for the demurrer in Pacific Railroad of Missouri v. Missouri Pacific Ry. Co., 111 U. S. 505, 514.

¹⁰ Daniell's Ch. Pr. (2d Am. ed.) 333, 655; Tourton v. Flower, 3 P. Wms. 369; Attorney-General v. Jackson, 11 Ves. 369; Dwight v. Central Vermont R.R. Co., 9 Fed. R. 785; Taylor v. Holmes, 14 Fed. R. 498, 499.

of the proper parties.¹¹ It is said by Mr. Daniell that "in the case of a demurrer for multifariousness, a mere allegation 'that the bill is multifarious' will be *informal*; it should state, as the ground of demurrer, that the bill unites distinct matters upon one record, and show the inconvenience of so doing."¹² But the case cited by him does not seem to hold that the more general form is bad.¹³ A defendant is not limited to show one cause of demurrer only; he may assign as many causes of demurrer as he pleases, either to the whole bill or to each part demurred to, and if any one of the causes of demurrer assigned hold good the demurrer will be allowed.¹⁴ When, however, two or more causes of demurrer are shown to the whole bill the court will treat it as one demurrer; and if one of the causes be considered sufficient the order will be drawn up, as upon a complete allowance of the demurrer.¹⁵

§ 116. *Demurrers ore tenus*. — At the hearing other causes of demurrer may be assigned orally; when the defendant is said to demur *ore tenus*.¹ When such a demurrer only is sustained and the previously assigned causes are held bad, the defendant usually recovers no costs,² and often is obliged to pay costs.³ But a demurrer *ore tenus* will, it has been said, never be allowed, unless there is a demurrer on record.⁴ Thus, when there was a plea on record, and that was disallowed, a demurrer *ore tenus* was also disallowed.⁵ A demurrer filed to a part cannot at the hearing *ore tenus* be extended to the whole of the bill; and such a demurrer is, it seems, only permitted for some cause which covers the whole extent of the demurrer filed.⁶ It is doubtful

¹¹ Taylor v. Holmes, 14 Fed. R. 498, 499.

¹² Daniell's Ch. Pr. (2d Am. ed.) 655.

¹³ Rayner v. Julian, 2 Dickens, 677; s. c. more fully reported, 5 Madd. 144, note.

¹⁴ Harrison v. Hogg, 2 Ves. Jr. 323; Jones v. Frost, 3 Madd. 9; s. c. on appeal, 1 Jacobs, 466.

¹⁵ Wellesley v. Wellesley, 4 Myl. & Cr. 554; Daniell's Ch. Pr. (2d Am. ed.) 657.

§ 116. ¹ Taylor v. Holmes, 14 Fed. R. 498; Brinkerhoff v. Brown, 6 J. Ch. (N. Y.) 149; Daniell's Ch. Pr. (2d Am. ed.) 657; Langdell's Eq. Pl. § 95; Story's Eq. Pl. § 464; Tourton v. Flower, 3 P. Wms. 371.

² Taylor v. Holmes, 14 Fed. R. 498, 499; Wright v. Dame, 1 Met. (Mass.) 237; Story's Eq. Pl. § 464; Daniell's Ch. Pr. 672. But see Rule 34.

³ Langdell's Eq. Pl. § 95; Story's Eq. Pl. § 464; Attorney-General v. Brown, 1 Swanst. 265, at page 268; Mortimer v. Fraser, 2 Myl. & Cr. 173.

⁴ Durdant v. Redman, 1 Vern. 78; Hook v. Dorman, 1 Sim. & S. 227; Story's Eq. Pl. § 464; Daniell's Ch. Pr. (2d Am. ed.) 668.

⁵ Story's Eq. Pl. § 464; Durdant v. Redman, 1 Vern. 78; Attorney-General v. Brown, 1 Swanst. 288; Hook v. Dorman, 1 Sim. & S. 227.

⁶ Equitable Life Assurance Society v.

whether by a demurrer *ore tenus* advantage can be taken of defects in form.⁷

§ 117. **Prayer of Judgment.** — A demurrer, having assigned the cause or causes of its interposition, then proceeds to demand judgment of the court whether the defendant ought to be compelled to put in any further or other answer to the bill, or to such part thereof as is specified as the subject of demurrer; and concludes with a prayer that the defendant be dismissed, or, if to a part only, that he be excused from answering that part, with his reasonable costs in that behalf sustained.¹ When the demurrer is to a part only of the bill, the answer or plea to what remains usually follows the statement of the causes of demurrer, and the submission to the judgment of the court of the plaintiff's right to call upon the defendant to make further or other answer.²

§ 118. **Certificate of Counsel.** — Every demurrer must be accompanied by a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay.¹ Otherwise, it might perhaps be disregarded;² though the proper remedy for this, as for any irregularity in form or in filing, would be to move to take the demurrer off the file.³ But it seems that the demurrer may be overruled for such an omission.⁴ Whether a certificate of counsel is required when the defendant appears in person, has not yet been decided in the Federal courts.⁵

§ 119. **Motions to take Demurrers off the File.** — The remedy for an irregularity in the form or the manner of filing a demurrer, for example, if there be an error in its title, or it be filed too late, is by a motion to take it off the file.¹ When an order to that effect is granted, the cause stands in the same position as if no demurrer had been filed; and the defendant is at liberty to

Patterson, 1 Fed. R. 126; *Baker v. Melish*, 11 Ves. 70, at page 76; *Story's Eq. Pl.* § 464. But see *Crouch v. Hickin*, 1 Keen, 385.

⁷ *Story's Eq. Pl.* § 443.

§ 117. ¹ *Daniell's Ch. Pr.* (2d Am. ed.) 659.

² *Daniell's Ch. Pr.* (2d Am. ed.) 659.

§ 118. ¹ Rule 31.

² *National Bank v. Insurance Company*, 104 U. S. 54, 76.

³ See § 119; *Daniell's Ch. Pr.* (2d Am. ed.) 661-663; *Ewing v. Blight*, 3 Wall. Jr. 134.

⁴ See U. S. R. S. § 747; 1 *Hoffman's Ch. Pr.* 97.

⁵ *Secor v. Singleton*, 9 Fed. R. 809; s. c. 3 *McCrary*, 230.

§ 119. ¹ *Ewing v. Blight*, 3 Wall. Jr. 134; *Curzon v. De la Zouch*, 1 Swanst. 193; *Daniell's Ch. Pr.* (2d Am. ed.) 661-663.

demur anew, or to plead or answer, as he may be advised.² The order that a demurrer be taken off the file may allow the defendant to file the same paper with the proper additions and corrections.³ The application should be for an order "to take a certain paper purporting to be a demurrer" off the file.⁴ A demurrer is not taken off the file by the mere entry of an order to that effect. The order should be taken to the clerk, who will withdraw the demurrer by annexing the order to it.⁵ By setting the demurrer down for argument or taking any other proceeding in the cause, all defects of form except the omission of the affidavit and certificate of counsel,⁶ and any irregularity in filing it, would probably be waived.

§ 120. **Setting Demurrer down for Argument.**—If the plaintiff fail to set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he is deemed to admit the sufficiency thereof, and his bill is dismissed as of course, unless a judge of the court allows him further time for the purpose.¹ The defendant filing the demurrer is the only party that can have the bill dismissed upon this account.² The former English practice in setting a demurrer down for argument was for the plaintiff to obtain an order *ex parte*, upon petition for that purpose; and to serve the same upon the defendant's solicitor at least two days before the hearing.³ In the different circuits of the United States the matter is usually regulated by local rule or custom.⁴ It has been held, that a demurrer to a bill seeking an injunction must be decided, before a motion for an injunction noticed after the filing of the demurrer can be heard,⁵ and before action is taken upon a plea subsequently or contemporaneously filed;⁶ and that while a demurrer is pending undecided, the allegations of the bill must for the purposes of a motion be deemed admitted.⁷

§ 121. **Argument of Demurrer.**—When a demurrer was called

² *Cust v. Boode*, 1 Sim. & S. 21; Daniell's Ch. Pr. 663.

³ *Bailey Washing Machine Company v. Young*, 12 Blatchf. 199.

⁴ Daniell's Ch. Pr. (2d Am. ed.) 732.

⁵ *Cust v. Boode*, 1 Sim. & S. 21; Daniell's Ch. Pr. (2d Am. ed.) 663.

⁶ *National Bank v. Insurance Company*, 104 U. S. 51, 76; *Secor v. Singleton*, 9 Fed. R. 809.

§ 120. ¹ Rule 38.

² *Chicago & Alton R. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 717.

³ Daniell's Ch. Pr. (2d Am. ed.) 665, 666.

⁴ See *Gordon v. St. Paul Harvester Works*, 23 Fed. R. 147.

⁵ *Ketchum v. Driggs*, 6 McLean, 13.

⁶ *Campbell v. Mayor*, 33 Fed. R. 795.

⁷ *Bayerque v. Cohen, M'Allister*, 113.

on for hearing and the defendant failed to appear, in the English practice the demurrer was struck out of the paper, unless the plaintiff had set down the demurrer, and could produce an affidavit of service upon the defendant or his solicitor of the order to set it down. If the plaintiff could produce such an affidavit, the demurrer was not necessarily overruled; but he had to be heard in support of the bill, the affidavit of service not authorizing the court, in the absence of the defendant, to overrule the demurrer, but to hear the plaintiff.¹ When the defendant appeared and the plaintiff did not, the demurrer was also struck out of the paper, unless the defendant could produce an affidavit of service upon himself of the order setting down the demurrer; or unless, in the event of the defendant having himself set down the demurrer, he could produce an affidavit of service upon the plaintiff or his solicitor. On the production of such an affidavit in either case, the defendant might have the demurrer allowed with costs.² Where a demurrer had been struck out of the paper, a fresh order had to be obtained for setting it down, which might be had either upon petition or motion.³ The usual course of proceeding, when the demurrer came on for hearing, and all parties appeared, was generally for the junior counsel for the party setting the demurrer down for argument to open the pleadings, after which the counsel in support of the demurrer were heard, and next the plaintiff's counsel, and then the leading counsel for the demurring party replied.⁴ The practice in these respects in the courts of the United States is very loose; it is sometimes regulated by the local rule, and often by a local custom, after the analogy of the State practice.

§ 122. **Overruling a Demurrer.** — If upon the hearing, any demurrer is overruled, the plaintiff is entitled to his costs in the cause up to that period, unless the court is satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay.¹ Upon the overruling of any demurrer, the defendant is assigned to answer the bill, or so much thereof as is covered by the demurrer, the next succeeding rule-day, or at such other period as con-

§ 121. ¹ *Penfold v. Ramsbottom*, 1 Swanst. 552; *Daniell's Ch. Pr.* (2d Am. ed.) 666, 667.

² *Jennings v. Pearce*, 1 Ves. Jr. 447.

³ *Tolson v. Lord Fitzwilliam*, 4 Madd. 403.

⁴ *Daniell's Ch. Pr.* (2d Am. ed.) 666, 667.

§ 122. ¹ Rule 34.

sistently with the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill is to be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.² If the plaintiff does not desire an answer, terms may be imposed as a condition upon the filing of an answer by the defendant.³ A demurrer is presumed abandoned when the parties proceed to a hearing after an answer without argument of the demurrer.⁴ When a demurrer both to the whole bill and to part thereof is sustained only as to a part, the proper decree is to dismiss so much of the bill as seeks relief in reference to the matters adjudged to be bad, overrule the demurrer to the residue, and direct the defendant to answer thereto.⁵ When several defendants have joined in the demurrer, it may be sustained as to one of them, and overruled as to the rest.⁶ "The court cannot let a demurrer stand for an answer, because it is a mute thing."⁷ It must be either sustained or overruled. If, therefore, it is doubtful whether a demurrer should be sustained or not, the court will overrule it, and allow the same defense to be taken by answer;⁸ or, even if it be not taken in the answer, may sustain it at the hearing.⁹ By special leave, such a defense may also be made by a plea.¹⁰ When the answer by supplying omissions in the bill establishes the complainant's case, a decree for him will not be reversed upon appeal, for an error in overruling a demurrer.¹¹ After a demurrer to the whole bill has been overruled, a second demurrer to the same extent cannot be allowed; for that would be in effect to re-hear the case on the first demurrer; as, on argument of a demurrer, any cause of demurrer, though not shown in the demurrer as filed, may be alleged at the bar, and if good will support the demurrer.¹² A demurrer, however, of a less extensive nature may

² Rule 34.

³ *Halderman v. Halderman*, Hempst. 407.

⁴ *Basey v. Gallagher*, 20 Wall. 670.

⁵ *Powder Co. v. Powder Works*, 98 U. S. 126.

⁶ *Mayor of London v. Levy*, 8 Ves. 403, 404; *Story's Eq. Pl.* § 445.

⁷ *Lord Chancellor Hardwicke*, in *Anon.*, 3 Atk. 530.

⁸ *Storrs v. Kansas Pacific Ry. Co.*, 5 Dill 486; *Bromley v. Town of Jeffer-*

sonville, 3 McLean, 336; *Standard Oil Co. v. Southern Pac. Ry. Co.*, 42 Fed. R. 295. See *Crawford v. The William Penn*, 3 Wash. 481.

⁹ *Johnasson v. Bonhote*, L. R. 2 Ch. D. 298.

¹⁰ *Daniell's Ch. Pr.* (2d Am. ed.) 675; *Rowley v. Eccles*, 1 S. & S. 512.

¹¹ *Cavender v. Cavender*, 114 U. S. 464. See also *West v. Randall*, 2 Mason, 181.

¹² *Daniell's Ch. Pr.* (2d Am. ed.) 674.

by special leave of the court be subsequently put in;¹³ and an amendment of a demurrer confining it to a part of the bill may also be allowed.¹⁴

§ 123. **Sustaining a Demurrer.**—If upon the hearing any demurrer be allowed, the defendant is entitled to his costs.¹ But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.² When a demurrer *ore tenus* is sustained,³ the defendant receives no costs, and perhaps may be ordered to pay costs.⁴ If the defect in the bill be clearly one that goes to the whole equity of the plaintiff's case, leave to amend will not be granted.⁵ According to Lord Cottenham, "it is not usual, upon allowing a general demurrer, to give leave to amend; but it may be done. It is in the discretion of the court so to do."⁶ And although courts are now very liberal in allowing amendments, leave to amend may be refused when the case of the defendant is a hard one, and he is free from wrong-doing, while the plaintiff has had an opportunity to plead the new matter when his bill was first drawn.⁷ Leave to amend is usually granted; and almost invariably when the defect in the bill consists in the misjoinder of parties,⁸ or the omission of those who can be served without ousting the court of jurisdiction.⁹ It has been held that a paper defective as a bill in equity may be sustained as a petition on an appeal from condemnation proceedings under a special statute.¹⁰

¹³ *Thorpe v. Macauley*, 5 Madd. 218, 231.

¹⁴ *Glegg v. Legh*, 4 Madd. 193, 207; *Baker v. Mellish*, 11 Ves. 70; *Atwill v. Ferrett*, 2 Blatchf. 39, 49.

§ 123. ¹ Rule 34.

² Rule 34.

³ *Taylor v. Holmes*, 14 Fed. R. 498; *Brinkerhoff v. Brown*, 6 J. Ch. (N. Y.) 149; *Langdell's Eq. Pl.* § 95; *Story's Eq. Pl.* § 464; *Daniell's Ch. Pr.* (2d Am. ed.) 672.

⁴ *Langdell's Eq. Pl.* § 95; *Lord Clarendon's Orders*, May 22, 1661; 1 *Sanders' Orders*, 298.

⁵ *Langdell's Eq. Pl.* § 96; *Tyler v.*

Bell, 2 Myl. & Cr. 89, *Lowe v. Farlie*, 2 Madd. 101; *Walker v. Powers*, 104 U. S. 245.

⁶ *Wellesley v. Wellesley*, 4 Myl. & Cr. 554, 558.

⁷ *Dowell v. Applegate*, 8 Fed. R. 698, s. c. 7 *Sawyer*, 232.

⁸ *Aylwin v. Bray*, 2 Y. & J. 518, note; *Tryon v. Westminster Improvement Commissioners*, 6 Jurist n. s. 1324.

⁹ *M'Elwain v. Willis*, 3 Paige (N. Y.), 505. See *Walker v. Powers*, 104 U. S. 245, 252.

¹⁰ *Cherokee Nation v. Southern Kansas Railway Co.*, 135 U. S. 641, 651.

CHAPTER IX.

PLEAS.

§ 124. **Definition and Classification of Pleas.**—A plea is a pleading which sets up some reason not apparent upon the face of the bill why the defendant should not be obliged to answer the whole or a part thereof. Lord Redesdale defines a plea as “a special answer to a bill, differing in this from an answer in the common form, as it demanded the judgment of the court, in the first instance, whether the special matter urged by it did not debar the plaintiff from his title to that answer which the bill required.”¹ A plea may be to the whole or to a part of the bill.² Usually but a single ground of defense can be presented by a plea, which, though it may state more than one fact, must bring the matters in issue to a single point.³ Otherwise, it is open to the charge of duplicity and multifariousness, and will be overruled.⁴ But if a bill contain different prayers for relief based upon different grounds, the defendant may file a plea to each part of the relief.⁵ And in other cases, where great inconvenience can thus be saved, the court may upon motion, after notice to the complainant’s solicitor, give special leave to file a double plea,⁶ or rather, according to Professor Langdell,⁷ two separate pleas, each containing a single defense. Thus, in England, a defendant to a bill for an injunction against the infringement of a patent and for an account was allowed to file a double

§ 124. ¹ *Roche v. Morgell*, 2 Sch. & Lef. 721, 725.

² Rule 32.

³ *Whitbread v. Brockhurst*, 1 Brown, Ch. C. 404, 416, note 9; s. c. 2 Ves. & Bea. 154, note; *Watkins v. Stone*, 2 Simons, 49; *Rhode Island v. Massachusetts*, 14 Pet. 210, 259; *Story’s Eq. Pl.* § 654.

⁴ *Rhode Island v. Massachusetts*, 14 Pet. 210, 259; *Gaines v. Mauseaux*, 1 Woods, 118; *Whitbread v. Brockhurst*, 1 Brown, Ch. C. 404, 416, note 9; s. c. 2 Ves. & Bea. 154, note; *Corporation of*

London v. Corporation of Liverpool, 3 Anst. 738; *Watkins v. Stone*, 2 Simons, 49; *Saltus v. Tobias*, 7 J. Ch. (N. Y.) 214; *Giant Powder Co. v. Safety Nitro Powder Co.*, 19 Fed. R. 509; *M’Closkey v. Barr*, 38 Fed. R. 165; *Story’s Eq. Pl.* §§ 653–655. But see *Reissner v. Anness*, 12 Off. Gaz. 842; s. c. 3 Bann. & A. Pat. Cas. 148.

⁵ *Emmott v. Mitchell*, 14 Simons, 432.

⁶ *Gibson v. Whitehead*, 4 Madd. 241; *Kay v. Marshall*, 1 Keen, 190.

⁷ *Langdell’s Eq. Pl.* § 98.

plea, "namely, first, that the invention was not useful, and secondly, that it was not new."⁸ It has been held that the question whether a patent has been infringed cannot be raised by a plea.⁹ A plea must not contain inconsistent allegations,¹⁰ as "a plea of the Statute of Limitations and of liability never incurred."¹¹ Nor, it has been said, can a plea properly raise by averment an issue not "raised by the bill."¹² But, if the plea be otherwise good, immaterial allegations will not vitiate it.¹³ Matters that have occurred since the filing of the bill may be set up by plea provided the time for filing the plea has not elapsed.¹⁴ Otherwise, such matters can only be pleaded by a supplemental answer or cross-bill.¹⁵ A plea should state facts, not arguments and conclusions of law, which will be disregarded.¹⁶ Thus, it has been held that pleas which state that defendant "is the sole owner in fee simple of the entire title of" the land which is the subject of the suit; "that, at the time of the bringing of this suit and long prior thereto, this defendant was and still is in the open, notorious, continuous, and exclusive possession of the said premises as the sole owner thereof, and claiming and holding adversely to the complainants and all the world;" and "that the said complainants were, at the time of bringing this suit and long prior thereto, ousted and disseised and out of possession of said premises," are bad. Pleas are either pure, negative, or anomalous. A pure plea sets up new matter as a defense which is not apparent upon the face of the bill.¹⁷ A negative plea, which is sometimes also termed an anomalous plea, merely denies certain allegations contained in the bill.¹⁸ An anomalous plea sets up a fact in avoidance of the bill, but one which the bill has antici-

⁸ *Kay v. Marshall*, 1 Keen, 190, 192. But see *Reissner v. Anness*, 12 Off. Gaz. 842; s. c. 3 Bann. & A. Pat. Cas. 148.

⁹ *Korn v. Wiebusch*, 33 Fed. R. 50; *Hubbell v. De Land*, 14 Fed. R. 471, 474.

¹⁰ *Emmott v. Mitchell*, 14 Simons, 432; *Story's Eq. Pl.* §§ 656, 657.

¹¹ *Emmott v. Mitchell*, 14 Simons, 432, 436.

¹² *Emmott v. Mitchell*, 14 Simons, 432, 436. But see *Rhode Island v. Massachusetts*, 14 Pet. 210, 270.

¹³ *Rhode Island v. Massachusetts*, 14 Pet. 210, 270; *Claridge v. Hoare*, 14 Ves. 59.

¹⁴ *Earl of Leicester v. Perry*, 1 Brown, Ch. C. 305; *Turner v. Robinson*, 1 Sim. & S. 3.

¹⁵ *Miller v. Fenton*, 11 Paige (N. Y.), 18; *Daniell's Ch. Pr.* (5th Am. ed.) 607.

¹⁶ *Beames on Pleas*, 22, 23; *Jerrard v. Saunders*, 2 Ves. Jr. 187; *National Bank v. Insurance Co.*, 104 U. S. 54; *Wood v. Mann*, 1 Sumner, 506; *McCloskey v. Barr*, 38 Fed. R. 165; *Emma Silver Mining Co. v. Emma Silver Mining Co. of New York*, 1 Fed. R. 39.

¹⁷ *McCloskey v. Barr*, 38 Fed. R. 165.

¹⁸ *Story's Eq. Pl.* § 651.

pated and without confessing replied to.¹⁹ Now that the benefits of discovery can be obtained at common law, negative and anomalous pleas are rarely used; and the learning and subtlety which have been displayed in discussing their characteristics are of little service, except as a means of mental discipline or for the gratification of an antiquarian taste. Those interested in studying their history and refinements are referred to the works of Beames on Pleas, Wigram on Discovery, and Langdell on Equity Pleading, where they will find the subject discussed at length, with full references to the cases. Pleas are either to the relief or to the discovery; and pleas to the relief are either pleas in abatement or pleas in bar.

§ 125. **Pleas in Abatement in General.**—The books which recognize pleas in abatement include among them pleas to the jurisdiction, pleas to the person, and pleas to the bill.¹ Matters in abatement can, in general, only be set up by plea or demurrer; and a defendant, by answering or pleading in bar, waives any such objection.² But the act of March 3, 1875, provides “that if in any suit commenced in a circuit court, or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just.”³ The objection that there is no jurisdiction in

¹⁹ Langdell's Eq. Pl. § 102; Story's Eq. Pl. § 651; *McDonald v. Salem Capital Flour Mills Co.*, 31 Fed. R. 577; *McCloskey v. Barr*, 38 Fed. R. 165; *Hilton v. Guyott*, 42 Fed. R. 249. But see *Milligan v. Milledge*, 3 Cr. 220.

§ 125. ¹ See Beames on Pleas, ch. 2; Story's Eq. Pl. §§ 705-708; Rule 39; *Memphis City v. Dean*, 8 Wall. 64.

² Beames on Pleas (1st Am. ed.) 63-64; Story's Eq. Pl. § 708; Rule 39; *Livingston v. Story*, 11 Pet. 351, 393; *Wick-*

liffe v. Owings, 27 How. 47, 52; *Rubber Co. v. Goodyear*, 9 Wall. 788, 792; *Wood v. Mann*, 1 Sumner, 506; *Dodge v. Perkins*, 4 Mason, 435; *Cittredge v. Claremont Bank*, 3 Story, 590; *Doggett v. Emerson*, 1 Woodb. & M. 196; *Blackburn v. Selma, M. & M. R. R. Co.*, 2 Flippin, 525.

³ Act of March 3, 1875, § 5; U. S. R. S. 1 Supp. 175; 18 St. at L. 470; reenacted March 8 1887, 24 St. at L. ch. 373. See *Nashua & Lowell R. R. Co. v. Boston & Lowell R. R. Co.*, 136 U. S. 356, 474.

equity because the complainant has an adequate remedy at law may be taken by demurrer, plea, or answer.⁴ Otherwise, the defendant waives the right to make it,⁵ although the court may for its own protection dismiss a bill for this reason at the final hearing when the pleadings are silent upon the subject.⁶ The reference of the matter in dispute to an arbitrator, under an agreement that his award shall be made the basis of a decree, is a waiver of such an objection.⁷

§ 126. **Pleas to the Jurisdiction.** — Pleas to the jurisdiction are: (1) That the subject of the suit is not within the jurisdiction of a court of equity;¹ (2) that some other court of equity has the proper jurisdiction;² (3) that the defendant has not been properly served with process.³

§ 127. **Pleas to the Person.** — Pleas to the person are: (1) That the plaintiff has not the legal capacity to sue either at all if an alien enemy,¹ or alone if an infant,² or without leave from the court as a receiver.³ (2) That the plaintiff is not the person whom he pretends to be, or does not sustain the character which he assumes; as, for example, that he is not executor,⁴ or not assignee,⁵ or not a corporation,⁶ when suing as such; or that the suit is brought in the name of a fictitious person;⁷ or that it is brought in the name of a person who sues for the benefit of another, through collusion or champerty;⁸ or, it seems, in a stockholder's suit founded upon a right which may properly be asserted by the corporation, that the corporation has not refused to sue.⁹ It has been held that the objection that the plaintiff is a lunatic and cannot sue without a next friend cannot be taken by

⁴ *Reynes v. Dumont*, 130 United States, 354, 395; *Wylie v. Cox*, 15 Howard, 415; *Kilbourn v. Sunderland*, 130 U. S. 505.

⁵ *Reynes v. Dumont*, 130 U. S. 354; 858. *Wylie v. Cox*, 15 How. 415.

⁶ *Parker v. Winnipiseogee Lake C. & W. Co.*, 2 Black, 545, 550; *Lewis v. Cocks*, 23 Wall. 466; *Oelrichs v. Spain*, 15 Wall. 211.

⁷ *Strong v. Willey*, 104 U. S. 512.

§ 126. ¹ *Story's Eq. Pl.* §§ 710-713.

² *Story's Eq. Pl.* §§ 714-716.

³ *Larned v. Griffin*, 12 Fed. R. 590; *Williams v. Empire Transportation Co.*, 1 N. J. L. J. 315.

§ 127. ¹ *Albrech v. Sussman*, 2 V. & B. 323; *Story's Eq. Pl.* § 724; *Mumford v. Mumford*, 1 Gall. 366.

² *Story's Eq. Pl.* § 725. But see *Dudgeon v. Watson*, 23 Fed. R. 161.

³ See *Newman v. Moody*, 19 Fed. R.

⁴ See *Rubber Co. v. Goodyear*, 9 Wall.

788, 792; *Ord v. Huddleston*, 2 Dickens, 510; *Story's Eq. Pl.* § 727.

⁵ *Nicholas v. Murray*, 5 Saw. 320.

⁶ *Dental Vulcanite Co. v. Wetherbee*, 2 Cliff. 555; *Blackburn v. Selma, M. & M. R. R. Co.*, 2 Flippin, 525.

⁷ *Chapman v. School District No. 1*, Deady, 108, 116.

⁸ *Dinsmore v. Central R. R. Co.*, 19 Fed. R. 153. But see *Sperry v. Erie Ry. Co.*, 6 Blatchf. 425.

⁹ *Newby v. Oregon Central Ry. Co.*, 1 Saw. 63, 67.

plea, and that the proper course for the defendant is to move either to strike the bill off the file on account of the complainant's mental incapacity, or for a stay of proceedings until a committee or next friend is appointed.¹⁰ (3) That the defendant cannot be sued except upon the happening of some event which has not occurred, as that he is a receiver, and no leave to sue him has been obtained from the court by which he was appointed.¹¹ (4) That the defendant is not the person he is alleged to be, or does not sustain the character which he is alleged to bear;¹² or that the person named as a defendant is not a corporation when sued as such, — in which case the person served with process on its behalf may file the plea in his own name,¹³ or was not incorporated under the laws of the State which is named in the bill as its creator;¹⁴ or that the defendant has become a bankrupt or insolvent, and his interest in the subject-matter has passed to his assignee.¹⁵

§ 128. **Pleas to the Bill.** — Pleas to the bill are: (1) That there is another suit depending in a domestic court of equity for the same matter. (2) That there is a want of proper parties. (3) That the bill will cause an improper multiplicity of suits. (4) Multifariousness.¹ Of these the first two are the only ones of much practical importance. It is doubtful whether either of the last two has ever been successfully maintained.² Judge Story thus speaks of them: "Thirdly, the plea of multiplicity of suits. This objection also may be taken by way of plea, for it is against the whole policy of courts of equity to encourage multiplicity of suits. Indeed, this constitutes one main ground of the objection of the want of sufficient parties, since its tendency is to multiply litigation. Fourthly, the plea of multifariousness, or of joining and confounding distinct matters in one bill. Generally this objection is apparent on the face of the bill, and then it could be taken by way of demurrer. But, in case the bill is so

¹⁰ *Dudgeon v. Watson*, 23 Fed. R. 161.

¹¹ *Barton v. Barbour*, 104 U. S. 126; *Jerome v. McCarter*, 94 U. S. 734, 737; *In re Young*, 7 Fed. R. 855. But see 24 St. at L. ch. 373, § 3.

¹² Story's Eq. Pl. §§ 732-734.

¹³ *Kelley v. Mississippi Central R. R. Co.*, 1 Fed. R. 564; s. c. 2 Flippin, 581. See also *Williams v. Empire Transportation Co.*, 1 N. J. L. J. 315.

¹⁴ *Blackburn v. Selma, M. & M. R. R. Co.*, 2 Flippin, 525.

¹⁵ *Kittredge v. Claremont Bank*, 3 Story, 590; Story's Eq. Pl. § 732. See also *Doggett v. Emerson*, 1 Woodb. & M. 196.

§ 128. ¹ Story's Eq. Pl. §§ 735-748.

² *Benson v. Hadfield*, 4 Hare, 32, 39; *McCloskey v. Barr*, 38 Fed. R. 165.

artfully framed that from that or from some other cause the objection does not appear on the face of the bill, the defendant may take advantage thereof by setting forth the special matter by a plea."³ The following plea was held bad and overruled: where the bill was filed to restrain the infringement of five patents, and stated that the defendant made and sold for use "soda-water fountains, each made according to, and employing and containing, the inventions described and claimed in each of the above-named letters-patent and reissued letters-patent." The plea set up as a defense that all of the letters-patent described in the bill were, as the bill showed, for separate and distinct inventions, "which several alleged inventions are not, in point of fact, connected together in use or operation, and are not, in point of fact, conjointly embodied in any of the soda-water and other fountains manufactured, used, or sold, by this defendant; so that the said plaintiff, by his single bill of complaint aforesaid, seeks to compel this defendant to unite five separate and distinct defences depending upon distinct and different proofs, so as to complicate the defence and embarrass this defendant in his answer to the said complaint; and that it is not true, as alleged in said bill, that the said defendant has made, constructed, used, and vended to others to be used, soda-water and other fountains, each made according to, and employing and containing the inventions described and claimed in each of the above-named letters-patent and reissued letters-patent."⁴

§ 129. **Pleas of Pendency of another Suit.** — A plea that another suit in equity is pending for the same cause in the same court is, if true, a sufficient defense to a bill.¹ The pendency of an action at law for the same matter is not, however, in itself a defense.² For the very fact that relief cannot be had at law is the usual ground for resorting to equity. If, however, there appears to be no sufficient reason for the maintenance of both, the court at equity may, after the defendant has answered, put the plaintiff to his election, whether he will proceed at law or in equity; and

³ Story's Eq. Pl. §§ 746, 749. See also *Benson v. Hadfield*, 4 Hare, 32.

⁴ *Matthews v. Lalance & G. Manuf. Co.*, 2 Fed. R. 232.

§ 129. ¹ Mitford's Pl. ch. 2, § 2, part 2; Story's Eq. Pl. § 736; *Umlin v. Hudson*, 1 Vern. 332; *Foster v. Vassall*, 3 Atk. 587, 590; *Crofts v. Wortley*, 1

Ch. Ca. 241; *Tarleton v. Barnes*, 2 Keen, 632, 635; *Insurance Co. v. Brune*, 96 U. S. 588, 592, 593. See also *Memphis City v. Dean*, 8 Wall. 64.

² *Graham v. Meyer*, 4 Blatchf. 129; *Thorne v. Towanda Tanning Co.*, 15 Fed. R. 289, 292.

if he elects the latter, then his proceeding at law will be enjoined; if the former, his bill will be dismissed.³ The pendency of another suit in a court of another of the United States, or of a foreign country, is not a bar to a suit for the same relief in a Circuit Court of the United States.⁴ Nor, it seems, although there the authorities are conflicting,⁵ is the pendency of a similar suit in a court held within the same State where the Federal court is held.⁶ The effect of the pendency of another suit for the same cause in another court of the United States has never been expressly decided;⁷ but there seems to be no difference in principle between such a suit and one in a court of another State, except that proceedings in such a case in a Federal court could be enjoined by a Federal judge.⁸ A plea that another suit is pending, in which the complainant might obtain by cross-bill the relief now sought by him, is bad.⁹ A plea of *lis pendens* should set forth the commencement of the former suit, its general nature, character, and objects, the relief prayed, and how far it has progressed;¹⁰ it should then aver specifically that the second suit is for the same subject-matter¹¹ as the first, and seeks the same, or similar, relief;¹² and further, that the former suit is still depending.¹³ It must show that the defendant was served or has appeared in the former suit.¹⁴ "For it is no suit depending till the

³ Story's Eq. Pl. § 742; Beames' Orders in Chancery, 11, 12; Mitford's Pleadings, ch. 2, § 2, part 2; Royle v. Wynne, 1 Craig & Ph. 252; Thorne v. Towanda Tanning Co., 15 Fed. R. 289, 292.

⁴ Insurance Co. v. Brune, 96 U. S. 588, 592, 593; Stanton v. Embrey, 93 U. S. 548; Lord Dillon v. Alvares, 4 Ves. 357. See Story's Eq. Pl. § 747.

⁵ See Radford v. Folsom, 14 Fed. R. 97; Brooks v. Mills County, 4 Dill. 524.

⁶ Latham v. Chafee, 7 Fed. R. 520; White v. Whitman, 1 Curt. 494; Sharon v. Hill, 22 Fed. R. 28; Washburn & Moen Manuf. Co. v. Scutt, 22 Fed. R. 710; Loring v. Marsh, 2 Cliff. 322; Gordon v. Gilfoil, 99 U. S. 168, 178; Dwight v. Central Vermont R. R. Co., 9 Fed. R. 785; Crescent City Live Stock Co. v. Butchers' Union Live Stock Co., 12 Fed. R. 225.

⁷ See Wheeler v. McCormick, 8 Blatchf. 267; Steiger v. Heidelberg, 4 Fed. R. 455; s. c. 18 Blatchf. 426; Brooks v. Mills County, 4 Dill. 524, 527.

⁸ See Massachusetts Mutual Life Ins. Co. v. Chicago & A. R. Co., 13 Fed. R. 857; Beauchamp v. Marquis of Huntley, Jacobs, 546; Erie Ry. Co. v. Ramsey, 45 N. Y. 637.

⁹ Washburn & Moen Manuf. Co. v. Scutt, 22 Fed. R. 710.

¹⁰ Crescent City Live Stock Co. v. Butchers' Union Live Stock Co., 12 Fed. R. 225; Foster v. Vassall, 3 Atk. 589, 590; Story's Eq. Pl. § 737.

¹¹ Devie v. Lord Brownlow, 2 Dickens, 611; Mitford's Pleadings, ch. 2, § 2, part 2; Story's Eq. Pl. § 737.

¹² Behrens v. Sieveking, 2 Myl. & Cr. 602; Wheeler v. McCormick, 8 Blatchf. 267; Jenkins v. Eldredge, 3 Story, 183; Story's Eq. Pl. § 737.

¹³ Story's Eq. Pl. § 737. See Urlin v. Hudson, 1 Vern. 332; Mitford's Pleadings, ch. 2, § 2, part 2.

¹⁴ Moor v. Welsh Copper Co., 1 Eq. Cas. Abr. 39, pl. 14.

parties have appeared or been served to appear, but only a piece of parchment thrown into the office, which may lie there forever, and never come to a suit.”¹⁵ “It is not necessary to the sufficiency of the plea that the former suit should be precisely between the same parties as the latter. For if a man institutes a suit, and afterwards sells part of the property in question to another, who files an original bill touching the part so purchased by him, a plea of the former suit depending touching the whole property will hold.”¹⁶ So where one part-owner of a ship filed a bill against the husband for an account, and afterwards the same part-owner and the rest of the owners filed a bill for the same purpose, the pendency of the first suit was held a good plea to the last; ¹⁷ for though the first bill was insufficient for want of parties, yet by the second bill the defendant was doubly vexed for the same cause. The course which the court has taken in such case has been to dismiss the first bill, and to direct the defendant in the second cause to answer upon being paid the costs of the plea allowed.”¹⁸ Where a former suit had been brought for a part, but not the whole of the relief sought in the case at bar, the court held its pendency no defense, but said that proceedings in it might be stayed until the determination of the second suit.¹⁹ “Where a second bill is brought by the same person for the same purpose, but in a different right, as where the executor of an administrator brought a bill conceiving himself to be the personal representative of the intestate, and afterwards procured administration *de bonis non*, and brought another bill, the pendency of the former bill is not a good plea.”²⁰ The reason of this determination seems to have been, that, the first bill being wholly irregular, the plaintiff could have no benefit from it, and it might have been dismissed upon demurrer. Where a decree is made upon a bill brought by a creditor on behalf of himself and all other creditors of the same person, and another creditor comes in before the master to take the benefit of the decree, and proves his debt, and then files a bill on behalf of himself and the other creditors,

¹⁵ *Moor v. Welsh Copper Co.*, 1 Eq. Cas. Abr. 39.

¹⁶ *Moor v. Welsh Copper Co.*, 1 Eq. Cas. Abr. 39.

¹⁷ *Durand v. Hutchinson*, Mich. 1771, in Chan.

¹⁸ Mitford's Pleadings, ch. 2, § 2, part

2, citing *Crofts v. Wortley*, 1 Ch. Cas. 241.

¹⁹ *Massachusetts Mutual Life Ins. Co. v. Chicago & A. R. Co.*, 13 Fed. R. 857.

²⁰ *Huggins v. York Building Co.*, 2 Atk. 44.

the defendants may plead the pendency of the former suit; for a man coming in under a decree is *quasi* a party.”²¹ When, after a bill had been filed to restrain the infringement of a patent and to obtain an account of profits, the defendant continues his infringements, the pendency of the first is no objection to a second bill seeking an injunction, and an account founded upon the subsequent infringements.²² According to Lord Redesdale, “as the pendency of the former suit, unless admitted by the plaintiff, is made the immediate subject of inquiry by one of the masters, a plea of this kind is not put in upon oath.”²³

§ 130. **Plea of Want of Parties.** — The plea of want of parties is sometimes included among pleas in bar.¹ The same defense may be made by answer;² and in a recent case the court refused to allow it to be set up by plea upon the ground that the same defense can be considered with more convenience and expedition when pleaded in an answer.³ Such a plea must state the names, if known, of all the persons for whose omission the defendant claims that the bill is defective.⁴ It should also state that they are living, and, unless they are in every aspect of the bill indispensable parties to it, that they are within the jurisdiction of the court.⁵ After a plea for want of parties has been sustained, and the bill amended by adding thereto the parties named in the plea, a second plea further objecting to the bill for the omission of other parties not named in the first plea cannot be filed.⁶ A plea to the whole bill for want of parties will be overruled if, in any aspect of the bill, the parties therein named would not be necessary.⁷

§ 131. **Pleas of Statutes.** — Pleas in bar set up some reason founded on the substance of the case, why the plaintiff is not entitled to relief. They rest upon some matter created either by

²¹ Mitford's Pl. ch. 2, § 2, part 2, citing upon last point *Neve v. Weston*, 3 Atk. 557.

²² *Wheeler v. McCormick*, 8 Blatchf. 267. *Roemer v. Newwan*, 19 Fed. R. 98; *Highy v. Columbia Rubber Co.* 18 Fed. R. 601. *Contra*, *Gold & Stock Telegraph Co. v. Pearce*, 19 Fed. R. 419.

²³ Mitford's Pleadings, ch. 2, § 2, part 2; citing *Umlin v. Hudson* 1 Vern. 332. But see the positive language of Rule 31.

2. See, however, *Story's Eq. Pl.* § 744, and citations.

², ³ *United States v. Gillespie*, 6 Fed. R. 803. See Rule 52.

⁴ *Attorney General v. Jackson*, 11 Ves. 367, 369; *Cook v. Mancius*, 3 Johns. en. (N. Y.) 427; *Dwight v. Central Vermont R. R. Co.* 9 Fed. R. 785; *Campbell v. James*, 2 Fed. R. 338, 348.

⁵ *Goodyear v. Toby*, 6 Blatchf. 138.

⁶ *Rawlins v. Dalton*, 3 Y. & Coll. 447.

⁷ *Homan v. Shiel*, 2 Jones (Irish), 164

§ 130. ¹ Mitford's Pl. ch. 2, § 2, part

statute, matter of record, or matter *in pais*, which last term signifies a matter of fact which is not of record, and is not given by statute special effect. Pleas founded upon matter that is made a bar by statute rest upon the statute of limitations, the statute of frauds, or less frequently some other statute. Federal courts of equity are not bound by State statutes of limitation,¹ except in cases where their jurisdiction is concurrent with the jurisdiction at common law;² but they will usually follow them,³ unless injustice would otherwise be done,⁴ thus enforcing the doctrine of equitable laches; and they will do so especially when suits are brought against executors,⁵ or to foreclose mortgages.⁶ Moreover, the lapse of time for a shorter period than the statute of limitations, and in cases to which that statute does not apply, will often be held such laches as to bar the complainant.⁷ It is not laches for a complainant to delay asserting his rights until the determination in another suit, brought by himself or another in a similar position, of a doubtful question of law materially affecting their validity.⁸ The United States is not bound by laches;⁹ and the State statutes of limitations do not affect it,¹⁰ even, it has been said, if specially named therein.¹¹ An individual seeking to enforce by subrogation the rights of a State may be estopped by laches of the State which would not have affected the State itself.¹² Municipal corporations and counties may be estopped by laches.¹³ The plea of the statute of limitations is in substantially the same form as a similar plea in an action at law, but no special form is essential.¹⁴ If the bill charge fraud or other matters, which, if true, would prevent the statute from

§ 131. ¹ *Johnson v. Roe*, 1 Fed. R. 692; *Etting v. Marx's Executor*, 4 Fed. R. 673. But see *Pratt v. Northam*, 5 Mason, 95.

² *Wagner v. Baird*, 7 How. 234, 258; *Godden v. Kimmell*, 99 U. S. 201; *Wilson v. Koontz*, 7 Cranch, 202.

³ *Godden v. Kimmell*, 99 U. S. 201; *Meath v. Phillips Co.*, 108 U. S. 553.

⁴ *Fogg v. St. Louis H. & K. R. R. Co.*, 17 Fed. R. 871, 873.

⁵ *Pulliam v. Pulliam*, 10 Fed. R. 53; *Broderick's Will*, 21 Wall. 503.

⁶ *Cleveland Ins. Co. v. Reed*, 1 Biss. 180.

⁷ *Brown v. Connty of Buena Vista*, 95 U. S. 157, 161.

⁸ *Buxton v. James*, 5 De Gex & Sm. 80, 84; *Rumford Chemical Works v. Vice*, 14 Blatchf. 179, 180; *Green v. Barney*, 19 Fed. R. 420; *People v. Cooper*, 22 Hun (29 N. Y. S. C. R.), 515, 517. See *Illinois G. T. Ry. Co. v. Wade*, 140 U. S. 65.

⁹ *U. S. v. Beebe*, 127 U. S. 338; *U. S. v. Insley*, 130 U. S. 263; *U. S. v. Dalles Military Land Co.*, 140 U. S. 599.

¹⁰ *Gibson v. Chouteau*, 13 Wall. 92; *U. S. v. Thompson*, 98 U. S. 486.

¹¹ *U. S. v. Thompson*, 98 U. S. 486, 490.

¹² *Cressy v. Meyer*, 138 U. S. 525.

¹³ *Boone County v. Burlington & M. R. R. Co.*, 139 U. S. 684.

¹⁴ *Harpending v. Reformed Protestant*

depriving the complainant of relief, the plea must deny them.¹⁵ It is not sufficient to deny them in an answer in support of the plea.¹⁵ The statute of frauds will be followed by the federal courts.¹⁶ If the bill shows that the complainant's case is repugnant to the statute of frauds, it is demurrable.¹⁶ This, however, is rarely the case, and the statute is usually referred to by plea or answer.¹⁷ The rule is thus stated by Lord Chancellor Cranworth: "It was argued that the statute of frauds was not open to the defendant, by reason of his not having insisted upon the statute as a defence; but this is a mistake. Where a defendant admits the agreement, if he intends to rely on the fact of its not being in writing and signed, and so being invalid by reason of the statute, he must say so; otherwise he is taken to mean that the admitted agreement was a written agreement good under the statute, or else that on some other ground it is binding on him; but where he denies or does not admit the agreement, the burden of proof is altogether upon the plaintiff, who must then prove a valid agreement capable of being enforced."¹⁸ The facts which show that the statute applies must be stated specifically.¹⁹ Otherwise the plea is bad.¹⁹ An act of Congress ratifying the construction of an otherwise illegal structure will, if constitutional, abate a suit for an injunction against the further maintenance of the structure, although not set up by plea, answer, or demurrer.²⁰

§ 132. **Pleas of Matter of Record.** — A plea founded upon matter of record sets up the judgment or decree of a court of record upon the same matter and between the same parties, or those in privity with them, in a cause of which it had jurisdiction. Pleas of matter of record are in some of the books distinguished from pleas of matter as of record. This distinction was due to the fact that, in England, the Court of Chancery in its equitable jurisdiction, the Court of Admiralty and ecclesiastical courts were deemed courts not of record, although their decrees had

Dutch Church, 16 Pet. 455; West Portland Homestead Assoc. v. Lowndale, 17 Fed. R. 205; Story's Eq. Pl. § 752.

¹⁵ Stearns v. Page, 1 Story, 204.

¹⁶ Randall v. Howard, 2 Black, 585, 589.

¹⁷ For an illustration of the plea, see Jackson v. Oglander, 2 H. & M. 165.

¹⁸ Ridgway v. Wharton, 3 De G. M. &

G. 677, 689. But see Heys v. Astley, 9 Law Times N. S. 356.

¹⁹ Bailey v. Wright, 2 Bond, 181; McCloskey v. Barr, 38 Fed. R. 165, 169.

²⁰ The Clinton Bridge, 10 Wall. 454. But see Griffing v. Gibb, 2 Black, 519; Liverpool, New York, & Philadelphia S. S. Co. v. Commissioners of Emigration, 113 U. S. 33, 38.

the same effect as the judgments of courts of record.¹ Judge Curtis held at circuit, that a judgment in a court of a foreign country cannot be pleaded in bar;² but in the present state of the law, the soundness of his decision may be doubted.³ A decree of a court of equity dismissing a bill to remove a cloud on title is not so far *res adjudicata* as to prevent the plaintiff from succeeding in a subsequent action of ejectment against the same defendant, although the court of equity in its opinion stated that the title of plaintiff was bad.⁴ A decree of a court of equity declaring void a conveyance of land beyond its jurisdiction, but not directing a reconveyance of such land, is void, and does not bind a court within the jurisdiction of which such land is situated.⁵ A decree of a court of equity will not be a bar if it resulted in the dismissal of a bill without prejudice;⁶ or for want of prosecution;⁷ or for a slip in practice;⁸ or by the former English practice, if it had not been signed and enrolled, although it could then be insisted on by answer as a good defense.⁹ No judgment or decree rendered after a proceeding not *in rem*, in which the defendant therein was not served with process;¹⁰ or in which the unsuccessful party was denied a hearing,¹¹ or some such other gross injustice was perpetrated as to render the so-called judicial proceeding not due process of law, is of any effect. Judgments or decrees obtained by fraud are not conclusive when properly impeached.¹² It seems that a decree upon a bill taken as confessed concludes the defendant in another suit.¹³ In pleading a judgment or decree, it is not necessary to set it forth, or the

§ 132. ¹ Story's Eq. Pl. § 778.

² Lyman v. Brown, 2 Curt. 559. See Burnham v. Webster, 1 W. & M. 172.

³ See Hilton v. Guyott, 42 Fed. R. 249; Martin v. Nicolls, 3 Simons, 458; Story, Conflict of Laws, §§ 606-608.

⁴ Phelps v. Harris, 101 U. S. 370. But see State v. Buller, 47 Fed. R. 415.

⁵ Carpenter v. Strange, 141 U. S. 87.

⁶ Durant v. Essex Co., 7 Wall. 107; House v. Mullen, 22 Wall. 42, 46; Northern Pacific Ry. Co. v. St. Paul, M. & M. Ry. Co., 47 Fed. R. 536; *infra*, § 600.

⁷ American Diamond Rock Boring Co. v. Sheldon, 17 Blatchf. 208; s. c. 4 Bann. & A. 551; Keller v. Stolzenbach, 20 Fed. R. 47; Conn v. Penn, 5 Wheat. 424, 427; Badger v. Badger, 1 Cliff. 241.

⁸ Durant v. Essex Company, 7 Wall. 107, 109; House v. Mullen, 22 Wall. 42, 46; Walden v. Bodley, 14 Pet. 158; Gist v. Davis, 2 Hill Ch. (S. C.) 335; Grubb v. Clayton, 2 Hayw. (N. C.) 378. See, however, Starr v. Stark, 1 Saw. 270.

⁹ Anon., 3 Atk. 809; Sto. Eq. Pl. § 790.

¹⁰ Pennoyer v. Neff, 95 U. S. 714; Life Insurance Co. v. Bangs, 103 U. S. 780; St. Clair v. Cox, 106 U. S. 350.

¹¹ Bischoff v. Wethered, 9 Wall. 812; Windsor v. McVeigh, 93 U. S. 274; Bradstreet v. Nept. Ins. Co., 3 Sum. 601.

¹² Pac. R. R. of Mo. v. Mo. Pac. Ry. Co., 111 U. S. 505.

¹³ Thompson v. Wooster, 114 U. S. 104, 111, 112; Ogilvie v. Herne, 13 Ves. 563.

proceedings upon which it was founded, at length;¹⁴ but so much of the decree and pleadings should be set forth as will show that the same point was then in issue,¹⁵ and the court may require the decree to be pleaded at length;¹⁶ or if the plea sets up matter of record in the same court, to show the record before the plaintiff is required to take action upon the plea.¹⁷

§ 133. **Pleas of Matter in Pais.** — Pleas founded upon matter *in pais* state some other reason, for example, a release, or an account stated, or a purchase without notice for a valuable consideration, why the plaintiff should not have relief.¹ A plea of purchase without notice for a valuable consideration should deny notice positively,² and should state the amount of the consideration.³ It is insufficient to plead that the defendant paid a "good and valuable consideration, to wit, a certain sum of money."³ A plea to a bill for an injunction to restrain the infringement of a reissued patent, which set up that the claim had been unlawfully expanded so as to embrace subsequent improvements covered by later patents, was held good.⁴ A plea to a bill filed under § 4918 of the Revised Statutes against the owner of a patent interfering with that of the complainant, which set up that the invention described in the complainant's patent was described in a previous English patent published in the United States, and filed in the Patent Office here before the issue of the complainant's patent, was held bad and overruled.⁵

§ 134. **Pleas to the Discovery.** — Pleas to the discovery set up new matter, showing (1) that the plaintiff's case is not such as entitles a court of equity to assume jurisdiction to compel a discovery in his favor; (2) that the plaintiff has no such interest in the subject-matter of the action as entitles him to call upon the defendant for a discovery; (3) that the defendant has no such interest in the subject-matter of the action as will entitle the plaintiff to call upon him for a discovery; (4) that the situation of the defendant renders it improper for a court of equity to com-

¹⁴ *Ricardo v. Garcias*, 12 Cl. & F. 368; Story Eq. Pl. § 783.

¹⁵ *Garcias v. Ricardo*, 14 Simons, 265; Story Eq. Pl. § 791; *Emma Silv. Min. Co. v. Emma Silv. Min. Co. of N. Y.*, 1 Fed. R. 39.

¹⁶ *Emma Silv. Min. Co. v. Emma Silv. Min. Co. of N. Y.*, 1 Fed. R. 39.

¹⁷ *Ibid.*

§ 133. ¹ Story's Eq. Pl. §§ 795-815.

² *Wood v. Mann*, 1 Sumner, 506.

³ *Secombe v. Campbell*, 18 Blatchf 108.

⁴ *Hubbell v. De Land*, 14 Fed. R. 471.

⁵ *Pentlarge v. Pentlarge*, 19 Fed. R. 817; s. c. 22 Fed. R. 412. But see *Foster v. Lindsay*, 3 Dill. 126, 131.

pel him to make a discovery.¹ Of them, Professor Langdell says: "But it should be added that, while demurrers to discovery are common, there are few instances of pleas of that kind; and the cases are few in which it would be advisable to resort to such a plea, since the question can be raised equally well by answer, and then the defendant's own statement of the facts will be equally conclusive."²

§ 135. **When a Plea must be filed.** — Unless the defendant's time has been enlarged, for cause shown, by a judge of the court, upon motion for that purpose, the plea should be filed on the rule-day next succeeding that of entering the defendant's appearance.¹

§ 136. **Frame of a Plea.** — A plea is entitled in the cause, and is headed as follows: "The plea of the above-named defendant (or, of A. B., one of the above-named defendants) to the bill of complaint of the above-named plaintiff (or plaintiffs)." When put in by more than one defendant, the heading runs as follows: "The joint and several plea of the above-named defendants (or of A. B. and C. D., two of the above-named defendants):"¹ but if filed by husband and wife in the wife's interest only, the words "and several" should be omitted; though their use, being mere surplusage, will not vitiate the plea.² The title of the plea should agree with that of the cause as stated in the bill. Any corrections which are desired to be made must be put in the heading, thus: "The plea of the above-named defendant, John Aber (in the bill, by mistake called Henry Aber);" or, "The plea of Henry Curtis and Mary his wife, lately, and in the bill called Mary Robinson, spinster" (or widow, as the case may be).³ When accompanied by an answer or demurrer, it should be headed: "The plea and answer;" or "The joint," or "joint and several plea and answer;" or "The joint and several plea, answer, and demurrer," &c., according to the circumstances.⁴ Like a demurrer, it is usually, but not necessarily, introduced by a useless protestation against the confession of the truth of any matter contained in the bill.⁵ After the protestation, the defendant should state in the plea the extent to which it goes:

§ 134. ¹ Mitford's Pl. ch. 2, § 2, part 2.

² Langdell's Eq. Pl. § 148.

§ 135. ¹ Rule 18.

§ 136. ¹ Daniell's Ch. Pr. (5th Am. ed.) 681.

² Fitch v. Chapman, 2 Sim. & S. 31.

³ Daniell's Ch. Pr. (5th Am. ed.) 681, 682.

⁴ Daniell's Ch. Pr. (5th Am. ed.) 682.

⁵ Daniell's Ch. Pr. (5th Am. ed.) 682; Story's Eq. Pl. § 694.

as whether it is to the whole bill, or to part only, and in the latter case the part to which it is intended to apply.⁶ Next should come the substance of the plea together with such averments as are necessary to support it.⁷ If these matters are within the defendant's knowledge he should state them positively.⁸ Otherwise, upon information and belief.⁹ The allegations must be made with certainty and not by way of argument, inference, or conclusion.¹⁰ The plea cannot properly allege and rely upon matters all of which are apparent upon the face of the bill.¹¹ The conclusion of the plea is usually a repetition that the matters so offered are relied upon as an objection to the jurisdiction, or to the person of the plaintiff or defendant, or to the frame of the bill and suit, or in bar of the suit; praying the judgment of the court, whether the defendant ought to be compelled to make any further or other answer to the bill, or so much thereof as the plea extends to.¹² It does not appear that any particular form of conclusion is necessary to a plea in equity.¹³ Every plea must be supported by a certificate of counsel, that in his opinion it is well founded in point of law, and by the affidavit of the defendant, that it is not interposed for delay, and that it is true in point of fact.¹⁴ When the facts alleged in the plea are within the defendant's knowledge, he must swear to them positively. Otherwise, upon information and belief.¹⁵ Whether the certificate of counsel is required when the defendant defends in person has never been decided.¹⁶ If the affidavit or certificate are omitted, the proper remedy would seem to be a motion to take the paper purporting to be a plea off the file;¹⁷ but, according to the language of a recent opinion of the Supreme Court, the plea might then be disregarded.¹⁸ By setting down

⁶ Mitford's Pl. ch. 2, § 2, part 2; Story's Eq. Pl. § 694.

⁷ Mitford's Pl. ch. 2, § 2, part 2; Story's Eq. Pl. § 694.

⁸ Foster v. Vassall, 3 Atk. 587; Boone v. Chiles, 10 Pet. 176, 210-213; Story's Eq. Pl. § 662.

⁹ Bolton v. Gardner, 3 Paige (N. Y.), 273; Story's Eq. Pl. § 662.

¹⁰ Emma Silver Mining Co. v. Emma Silver Mining Company of New York, 1 Fed. R. 329; Nabob of Arcot v. East India Co., 3 Brown, Ch. C. 292; Story's Eq. Pl. § 662.

¹¹ Billing v. Flight, 1 Madd. 230; Story's Eq. Pl. § 660.

¹² Story's Eq. Pl. § 694; Mitford's Pl. ch. 2, § 2, part 2.

¹³ Daniell's Ch. Pr. (5th Am. ed.) 688.

¹⁴ Rule 31.

¹⁵ Ewing v. Blight, 3 Wall. Jr. 134.

¹⁶ See U. S. R. S. § 747; 1 Hoffman's Ch. Pr. 97; Daniell's Ch. Pr. (5th Am. ed.) 311, note 7.

¹⁷ Ewing v. Blight, 3 Wall. Jr. 134.

¹⁸ National Bank v. Insurance Co., 104 U. S. 54.

the plea for argument, such a defect is waived.¹⁹ Like all other proceedings in equity, a plea must contain no scandalous or impertinent matter. If it does, the same proceedings may be taken upon it as when scandal or impertinence is contained in an answer.²⁰ Only one plea can be filed unless by special leave of the court.²¹

§ 137. **Answers with Pleas.** — Although the purpose of a plea is usually to avoid discovery, yet in certain cases it must be accompanied by an answer. If the plea be to a part only of the bill, it must ordinarily be accompanied by an answer or demurrer to the residue.¹ "In every case where the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded."² Negative and anomalous pleas must usually be accompanied by an answer giving the discovery required by the bill.³ This subject is now of comparatively little importance, as the objections raised by such pleas can now be taken by answer⁴ with more safety and convenience. The clearest statement and explanation of the rule with which the writer is acquainted, is that by Professor Langdell. "If the defence which is set up by a plea has been anticipated by the bill, and evidence has been charged in disproof of the defence, the defendant must answer such charges of evidence, notwithstanding his plea, for an answer to that extent will be needed in trying the truth of the plea. The defendant, therefore, incorporates an answer with his plea; and then the answer is said to support the plea. Such an answer, it will be observed, contains discovery only, and it is called an answer in support of a plea, to distinguish it from the case where a defendant *defends* by answer as to part of the bill, and by plea as to part."⁵ "If a bill anticipates a defence, and, without admitting its truth, replies to it affirmatively, and the defendant

¹⁹ *Goodyear v. Toby*, 6 Blatchf. 130.

²⁰ Daniell's Ch. Pr. (2d Am. ed.) 686.
See *Dixon v. Olmuis*, 1 Cox, Eq. 412.

²¹ *Wheeler v. McCormick*, 8 Blatchf. 267; *Lamb v. Starr*, Deady, 351; *Noyes v. Willard*, 1 Woods, 187; *Reissner v. Anness*, 12 Off. Gaz. 842; s. c. 3 Bann. & A. 148.

§ 137. ¹ Rules 18, 32; Langdell's Eq. Pi. § 99; *Ferguson v. O'Harra*, Pet.

C. C. 493. But see *Hilton v. Guyott*, 42 Fed. R. 249.

² Rule 32; *Platt v. Oliver*, 1 McLean, 295; *Lewis v. Baird*, 3 McLean, 56; *Bailey v. Wright*, 2 Bond, 181. But see *Hilton v. Guyott*, 42 Fed. R. 249.

³ *Dwight v. Central Vt. R. R. Co.*, 9 Fed. R. 785; Langdell Eq. Pl. §§ 101-114.

⁴ Rule 39.

⁵ Langdell's Eq. Pl. § 100.

wishes to set up the defence by plea, it is obvious that he must traverse the anticipatory replication; for otherwise, in the event of issue being taken upon the truth of the plea, the affirmative replication will be admitted to be true. A negative rejoinder, therefore, must be incorporated with the affirmative plea. Such pleas have become common in modern times; and being partly affirmative and partly negative, they are distinguished by the name of anomalous pleas. If the defendant should not be prepared to deny the truth of the affirmative replication, and should wish to set up an affirmative answer to it, of course both branches of his plea should be affirmative; but no instance of such a plea has been found in the reported cases. If an anomalous plea be put in issue, it will be seen that each party has something to prove; namely, the defendant his affirmative defence, and the plaintiff his affirmative replication; and the plaintiff is, therefore, entitled to discovery as to the latter. Consequently, an anomalous plea must always be supported by an answer as to the allegations which constitute the replication, and as to all charges of evidence, if any, in support of such allegations."⁶ Such an answer is usually prefaced by an averment that the defendant does not thereby waive his plea, but wholly relies thereon.⁷

§ 138. **Proceedings of the Plaintiff when a Plea is filed** — If the allegations in a plea are sufficient and true, but the plaintiff can produce new matter which will avoid its effect, he must amend his bill, introducing by way of pretence or otherwise a statement of the matters contained in the plea, and also a substantive allegation of the new matter by which he avoids it. In such a case, at common law or by the earlier chancery practice, he would reply by confession and avoidance; but special replications are no longer used in equity, their purpose being sufficiently answered by the practice of amendment.¹ Otherwise, the plaintiff may either move to take the plea off the file for irregularity,² or set down the plea to be argued,³ or move for a reference to a master,⁴ or take issue upon the plea.⁵ If

⁶ Langdell's Eq. Pl. § 101. See also Langdell's Eq. Pl. §§ 102-114; Story's Eq. Pl. §§ 668-674; *Foley v. Hill*, 3 Myl. & Cr. 476.

⁷ Story's Eq. Pl. § 695.

§ 138. ¹ *Mason v. Hartford, Providence & Fishkill R. R. Co.*, 10 Fed. R.

334; Rules 29, 66; Story's Eq. Pl. chs. xix., xx.

² *Ewing v. Blight*, 3 Wall. Jr. 134.

³ Rule 33.

⁴ *Tarleton v. Barnes*, 2 Keen, 632.

⁵ Rule 33.

he neither amends nor takes any of these proceedings before the rule-day next after that on which the same was filed, he is deemed to admit the truth and sufficiency of the plea, and his bill will be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.⁶ More indulgence in this respect will be allowed to States than to individuals,⁷ and the plaintiff is not obliged to take notice of a plea until it has been entered in the order book or served upon him.⁸ In case of a motion to take the plea off the file, it will be more prudent to obtain an extension of time wherein to reply or set down the plea, in case it should be allowed to remain.⁹ No one, except the defendant who files a plea, can take advantage of the failure of the plaintiff to act upon it.¹⁰ Where the plaintiff had taken no action upon the plea for eight months, it was held that the defendant might withdraw it and file an answer.¹¹ Otherwise, neither party is, in general, at liberty to take any step in a cause after the filing of a plea, until the plea is disposed of.¹² If the defendant pleads to the relief only, and proposes to answer the whole discovery required, the plaintiff may file exceptions to the answer.¹³ This, it was formerly held, he could not do unless by special leave of the court, without thereby admitting the truth of a plea which extended to any part of the discovery.¹⁴ In an extraordinary case, a motion for an injunction might be made while a plea was pending: but the more usual course is to pray the court to expedite the hearing of the plea.¹⁵ When a plea and a demurrer were filed at the same time, it was held that action on the plea should be postponed till the hearing on the demurrer.¹⁶

§ 139. **Motion to take a Plea off the File.** — A motion to take a plea off the file is, it seems, the proper remedy, when the plea was filed too late,¹ or has such an irregularity in form as the

⁶ Rule 38.

⁷ *Rhode Island v. Massachusetts*, 14 Pet. 210.

⁸ *Newby v. Oregon Central Ry. Co.*, 1 Saw. 63, 65.

⁹ See Rule 38.

¹⁰ *Chicago & Alton R. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702, 717.

¹¹ *Oliver v. Decatur*, 4 Cranch C. C. 458.

¹² *Daniell's Ch. Pr.* (5th Am. ed.) 691; *Buchanan v. Hodgson*, 11 Beav. 368.

¹³ *Pigot v. Stace*, 2 Dickens, 496; *Sidney v. Perry*, 2 Dickens, 602.

¹⁴ *Darnell v. Reyny*, 1 Vern. 344; *Brownell v. Curtis*, 10 Paige (N. Y.), 210.

¹⁵ *Ewing v. Blight*, 3 Wall. Jr. 139; *Humphreys v. Humphreys*, 3 P. Wms. 395.

¹⁶ *Cambell v. Mayer*, 33 Fed. R. 795.

§ 139. ¹ *McKewan v. Sanderson*, L. R. 16 Eq. 316; *Ewing v. Blight*, 3 Wall. Jr. 134.

omission of the requisite affidavit and certificate.² In a patent case, a plea which simply denied infringement was stricken from the files as improper in form.³ When two pleas are filed without special leave, the defendant will be obliged to elect between them within ten days. Otherwise, both will be ordered to stand for an answer,⁴ or possibly be stricken out.⁵ Unless, however, an objection to such a defect is specifically made, it will be considered waived.⁶

§ 140. **Argument of a Plea.** — “If the plaintiff conceives a plea to be defective in point of form or substance, he may take the judgment of the court upon its sufficiency. And if the defendant is anxious to have the point determined, he may also take the same proceeding.”¹ A plea is set down for argument in the same manner as is a demurrer, and the proceedings at the argument are also substantially the same. A plaintiff has been allowed, although the practice is irregular, to file a demurrer to a plea; in which case the demurrer presents the question of the sufficiency of the bill as well as the plea.² The sufficiency of the bill as to substance is also tested when the plea is set down for argument; but it has been said that the allegations therein are not taken so strictly against the complainant as in case of a demurrer.³ It has been said that when a plea is set down for argument, the complainant cannot take any exception to its regularity or form.⁴ For the purpose of the argument, all allegations in the plea which are not inconsistent with each other are presumed to be true;⁵ but if a document is referred to in the plea and annexed thereto, its language will control the description of it set forth in the body of the plea.⁶ Upon argument, a plea may be allowed, or the benefit thereof may be reserved to the hearing, or it may be ordered to stand for an answer, or it may be

² *Ewing v. Blight*, 3 Wall. Jr. 134; *Sharp v. Reissner*, 20 Blatchf. 10, 13. But see *National Bank v. Insurance Co.*, 104 U. S. 54, 76; *Secor v. Singleton*, 9 Fed. R. 809; s. c. 3 McCrary, 230.

³ *Sharp v. Reissner*, 20 Blatchf. 10, 13.

⁴ *Reissner v. Anness*, 12 Off. Gaz. 842; s. c. 3 Bann. & A. 148; *Noyes v. Willard*, 1 Woods, 187.

⁵ *Newby v. Oregon Central Ry. Co.*, 1 Saw. 63, 67.

⁶ *Sharon v. Hill*, 22 Fed. R. 28.

§ 140. ¹ Mitford's Pl. ch. 2, § 2, part 2.

² *Beard v. Bowler*, 2 Bond, 13; *Good-year v. Toby*, 6 Blatchf. 130. See *Stead's Executors v. Course*, 4 Cranch, 403, 410.

³ *Rumbold v. Forteath*, 2 Jur. n. s. 686.

⁴ *Green, J.*, in *Kellner v. Mutual Life Ins. Co.*, 43 Fed. R. 623, 626.

⁵ *Mellus v. Thompson*, 1 Cliff. 125; *Ex'rs of Gallagher v. Roberts*, 1 Wash. 320; *Farley v. Kitson*, 120 U. S. 303; *Kellner v. Mutual Life Ins. Co.*, 43 Fed. R. 623, 626.

⁶ *Wheeler v. McCormick*, 8 Blatchf. 267.

overruled.⁷ "In the first case the plea is determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the averments necessary to support it, are true."⁸ If, therefore, a plea is allowed upon argument the plaintiff may take issue upon it, and have a trial of the truth of the facts upon which it is sought to be supported.⁸ "If a plea accompanied by an answer is allowed, the answer may be read at the hearing of the cause to counterprove the plea."⁸ If upon the hearing any demurrer or plea be allowed, the defendant is entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.⁹ "If, upon argument, the benefit of a plea is saved to the hearing, it is considered that so far as appears to the court it is a full defence, but that there may be matter disclosed in evidence which would avoid it, supposing the matter pleaded to be strictly true; and the court therefore will not preclude the question."¹⁰ In such a case, the truth of the plea must be established, and at the hearing the plaintiff may avoid it by other matter, which he is at liberty to prove.¹¹ "When a plea is ordered to stand for an answer, it is merely determined that it contains matter which may be a defence, or part of a defence; but that it is not a full defence, or it has been informally offered by way of plea, or it has not been properly supported by answer, so that the truth of it is doubtful. For if a plea requires an answer to support it, upon argument of the plea the answer may be read to counterprove the plea; and if the defendant appears not to have sufficiently supported his plea by his answer, the plea must be overruled, or ordered to stand for an answer only. A plea is usually ordered to stand for an answer where it states matter which may be a defence to the bill, though perhaps not proper for a plea, or informally pleaded. But if a plea states nothing which can be a defence, it is merely overruled. If a plea is ordered to stand for an answer, it is allowed to be a sufficient answer to so much of the bill as it covers, unless by the bill liberty is given to except. But that liberty may be qualified, so as to protect the defendant from any par-

⁷ Mitford Pl. ch. 2. § 2, part 2; See R.

⁸ *I. v. Mass.*, 14 Pet. 210, 257-259.

⁹ Mitford's Pl. ch. 2. § 2, part 2.

¹⁰ Rule 35.

¹¹ Mitford's Pl. ch. 2. § 2, part 2.

¹² Story's Eq. Pl. § 698; *Rhode Island v. Massachusetts*, 14 Pet. 210, 257-259.

ticular discovery which we ought not to be compelled to make: and if a plea is accompanied by an answer, and is ordered to stand for an answer without liberty to except, the plaintiff may yet except to the answer as insufficient to the parts of the bill not covered by the plea.”¹² Where one defense is made by the plea and another by an answer filed with it, the plea may be ordered to stand for an answer.¹³

A plea formerly might have been overruled for three reasons; because it was bad, as defective in form, or insufficient in point of law; because, though good as to a part of the bill, it was filed to more than it could cover; and because the defendant answered some or all of the matters covered by it.¹⁴ Now, however, a pure plea, though filed to the whole bill, may be sustained as to a part only.¹⁵ But an answer to the whole bill will overrule a plea in bar filed by the answering defendant.¹⁶ “The rule that no plea is to be held bad only because the answer may extend to some part of the same matter as may be covered by the plea, is not applicable where the answer extends to the whole of the matter covered by the plea.”¹⁷ If upon the hearing any plea is overruled, the plaintiff is entitled to his costs in the cause up to that period, unless the court is satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And upon the overruling of any plea, the defendant is assigned to answer the bill, or so much thereof as is covered by the plea, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can in the judgment of the court be reasonably done; in default whereof, the bill is taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.¹⁸ Under this rule it has been held that permission to answer cannot be

¹² Mitford's Pl. ch. 2, § 2, part 2.

¹³ Lewis v. Baird, 3 McLean, 56, 62.

¹⁴ Wigram on Discovery (1st ed.), 172-181; Story's Eq. Pl. §§ 688, 693; Thring v. Edgar, 2 Sim. & S. 274; Salkeld v. Science, 2 Ves. Sen. 107; Chamberlain v. Agar, 2 V. & B. 259; Stearns v. Page, 1 Story, 204; Ferguson v. O'Harra, Pet. C. C. 493.

¹⁵ Rules 36, 37; Wythe v. Palmer, 3 Saw. 412; Kirkpatrick v. White, 4 Wash.

595. But see Milligan v. Milledge, 3 Cranch, 220.

¹⁶ Grant v. Phoenix Life Ins. Co., 121 U. S. 105, 115; Dakin v. Union Pacific Ry. Co., 5 Fed. R. 665; Crescent City Live Stock Co. v. Butchers' Union Live Stock Co., 12 Fed. R. 225. But see Hayes v. Dayton, 8 Fed. R. 702, 706.

¹⁷ Grant v. Phoenix Life Ins. Co., 121 U. S. 105, 115.

¹⁸ Rule 36.

denied the defendant.¹⁹ Upon the overruling of a plea, permission to amend it may be given;²⁰ or a second plea upon a different ground may be interposed, but only by leave of the court.²¹ If put in without leave, such a new plea will, on motion, be taken off the file.²² It seems that after his plea is overruled, the defendant may demur, at least to a part of the bill, by leave of the court.²³

§ 141. **Motion for a Reference of a Plea.** — There are some pleas upon which no issue is taken. Such were pleas of outlawry and excommunication, which were always pleaded *sub sigillo*, that is, under the seal of the court which had pronounced the sentence. The truth of the fact pleaded in them could, therefore, be ascertained from the form of pleading. The plaintiff was, however, at liberty to show that the plea was defective in form, or that it did not apply to the particular case; and for these purposes he might have the plea argued.¹ “Pleas of a former decree, or of another suit depending, are generally in the same predicament, being referred to a master to inquire into the fact. If in any of these cases, the master reports the fact true, the bill stands instantly dismissed, unless the court otherwise orders. But the plaintiff may except to the master’s report, and bring on the matter to be argued before the court; and if he conceives the plea to be defective, in point of form or otherwise, independent of the mere truth of the fact pleaded, he may set down the plea to be argued as in the case of pleas in general.”² Where it is manifest upon the face of the plea that the two suits are not alike, no reference will be ordered.³ By the English practice, if the plaintiff set down a plea for argument, he admitted its truth; and if good in form it was sustained.⁴

§ 142. **Hearing upon Pleas.** — If the complainant deems a plea sufficient in form, or it has been so held by the court, he can

¹⁹ *Wooster v. Blake*, 7 Fed. R. 816.

²⁰ *Sanders v. King*, 6 Madd. 61; *Loving v. Fairchild*, 1 McLean, 333; U. S. R. S. § 954.

²¹ *McKewan v. Sanderson*, L. R. 16 Eq. 316; *Chadwick v. Broadwood*, 3 Beav. 316; *Lamb v. Starr*, Deady, 350; *Wheeler v. McCormick*, 8 Blatchford, 267.

²² *McKewan v. Sanderson*, L. R. 16 Eq. 316.

²³ *The East India Company v. Camp-*

bel, 1 Ves. Sen. 246; *Daniell’s Ch. Pr.* (5th Am. ed.) 702.

§ 141. ¹ *Mitford’s Pl. ch. 2, § 2, part 2.*

² *Mitford’s Pl. ch. 2, § 2, part 2.* See also *Emma Silver Mining Co. v. Emma Silver Mining Company of New York*, 1 Fed. R. 39; *Jones v. Segueira*, 1 Phillips, 82; *Story’s Eq. Pl. §§ 700, 743, 744.*

³ *Loring v. Marsh*, 2 Cliff. 311.

⁴ *Tarleton v. Barnes*, 2 Keen, 632. See *Story’s Eq. Pl. §§ 743, 744.*

still test its truth by taking issue upon it.¹ He does this by filing the general replication.² The proceedings in taking testimony, and bringing the cause to a hearing, are substantially the same as after an issue raised upon an answer.³ At the hearing, the defendant has the right to open and close the argument, and the burden of proof rests upon him.⁴ If the plea be then found false, the plaintiff may, if he so choose, have the bill taken *pro confesso*.⁵ "Having put the plaintiff to the trouble and delay of an issue, the defendant cannot, after it has been found against him, claim the right to file an answer, although, if the complainant desires a discovery, which the plea is sought to avoid, he may undoubtedly insist upon it."⁶ In an extraordinary case, however, the court might still allow the defendant to answer.⁷ If the plea were found true, according to the former practice the plea was held a complete defense to so much of the bill as it was intended to apply to; and if filed to the whole bill, the bill would be dismissed as of course, irrespective of the sufficiency of the plea.⁸ Now, however, the equity rules provide that "if, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him."⁹ Under this rule, it has been held that after a replication has been filed and testimony taken, the court may, without examining the testimony, overrule the plea for insufficiency and allow the defendant to answer.¹⁰ If, however, the truth of a plea upon which issue has been joined is not estab-

§ 142. ¹ Mitford's Pl. ch. 2, § 2, part 2; Rhode Island v. Massachusetts, 14 Pet. 210, 257.

² Hughes v. Blake, 6 Wheat. 453.

³ Reissner v. Anness, 13 Off. Gaz. 7; Lilienthal v. Washburn, 8 Fed. R. 707; Hughes v. Blake, 6 Wheat. 453, 472; Farley v. Kittson, 120 U. S. 303.

⁴ Stead's Executors v. Course, 4 Cranch, 403, 413; Gernon v. Boecaline, 2 Wash. 199; Farley v. Kittson, 120 U. S. 303; Lilienthal v. Washburn, 8 Fed. R. 707; Sharon v. Hill, 22 Fed. R. 28.

⁵ Kennedy v. Creswell, 101 U. S. 641, 644; Mitford's Pl. ch. 2, § 2, part 2.

⁶ Mr. Justice Bradley in Kennedy v. Creswell, 101 U. S. 641, 644.

⁷ In the language of Chief Justice

Taney, in Poultney v. City of La Fayette, 12 Pet. 472, 474.

⁸ Hughes v. Blake, 6 Wheat. 453; s. c. 1 Mason, 515; Rhode Island v. Massachusetts, 14 Pet. 210, 257; Myers v. Dorr, 13 Blatchf. 22; Theberath v. Rubber & Celluloid Harness Trimming Co., 5 Bann. & A. 584; Cottle v. Kremenz, 25 Fed. R. 494; Birdseye v. Heilner, 26 Fed. R. 147; Bean v. Clark, 30 Fed. R. 225.

⁹ Rule 33. But see Myers v. Dorr, 13 Blatchf. 22.

¹⁰ Matthews v. Lalance & G. Manuf. Co., 2 Fed. R. 232. But see Myers v. Dorr, 13 Blatchf. 22; Theberath v. Rubber & Celluloid Harness Trimming Co., 5 Bann. & A. 584; Cottle v. Kremenz, 25 Fed. R. 494.

lished, the bill cannot before answer be dismissed for want of equity.¹¹ Leave to withdraw the replication and amend or to set down the plea for argument may under special circumstances be obtained.¹² By replying to a plea, objections to its form or for a failure to support it by answer are waived.¹³

§ 143. **General Remarks upon Pleas.** — In conclusion, it may be remarked that the cautious practitioner will act wisely in eschewing the use of pleas, unless he desires to plead matter in abatement, or in extraordinary cases. For it is as true now as in the time of Beames, that the subject of pleas in equity is one “concerning which so much still remains to be elucidated, that it may be said of them, *maxima pars eorum quae scimus est minima eorum quae ignoramus.*”¹

¹¹ Farley v. Kittson, 120 U. S. 303.

¹³ Stead's Executors v. Course, 4

¹² Cottle v. Krementz, 25 Fed. R. 494; Cranch, 403; Farley v. Kittson, 120 U. S. Hughes v. Blake, 6 Wheat. 453, 473: 303.

Rules 29 and 35.

§ 143. ¹ Beames on Pleas, 61.

CHAPTER X.

ANSWERS AND DISCLAIMERS.

§ 144. **Pleading Defenses in an Answer.** — An answer in equity serves two purposes, the setting up of the defenses to the suit, and discovery. It cannot ordinarily pray relief against the complainant, and never against a co-defendant.¹ If a defendant desires such relief he must ordinarily file a cross-bill.² The defendant is entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to the character of the parties, or matters of form), in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar.³ Matters in abatement, such as *lis pendens*, which do not affect the jurisdiction, cannot be set up by answer.⁴ An answer may contain defenses which have been previously raised by plea or demurrer and overruled.⁵ Facts that have occurred since the filing of the bill may be pleaded in an answer.⁶ The defenses must not be inconsistent with each other.⁷ If so, it seems, that both will be disregarded,⁸ unless the inconsistent allegations are trifling, when they may be treated as surplusage.⁹ It is not considered inconsistent for a defendant both to deny the complainant's title and to allege that he has waived a right which he claims under it.¹⁰ The defense of a license from the plaintiff to commit the acts complained of is, in the absence of special covenants or recitals in the license, not inconsistent with other defenses impugning the validity of

§ 144. ¹ *Ford v. Douglas*, 5 How. 143; *Ch. C.* 305; *Turner v. Robinson*, 1 Sim. & S. 3. *Hubbard v. Turner*, 2 McLean, 519; *Morgan v. Tipton*, 3 McLean, 339; *Chapin v. Walker*, 6 Fed. R. 794; s. c. 2 McCrary, 175.

² See chapter XIII., Cross-Bills.

³ Rule 39.

⁴ *Pierce v. Feagans*, 39 Fed. R. 587; *supra*, § 125.

⁵ *Crawford v. The William Penn*, 3 Wash. 484; *Burnley v. Town of Jeffersonville*, 3 McLean, 336; *Storms v. Kansas Pacific Ry. Co.*, 5 Dill. 486; *Rhode Island v. Massachusetts*, 14 Pet. 210.

⁶ *Earl of Leicester v. Perry*, 1 Brown

Ch. C. 305; *Turner v. Robinson*, 1 Sim. & S. 3.

⁷ *Chapman v. School District No. 1*, Deady, 108, 115; *Jesus College v. Gibbs*, 1 Y. & C. 145, 147; *Leech v. Bailey*, 6 Price, 504; *Daniell's Ch. Pr.* (5th Am. ed.) 714.

⁸ *Jesus College v. Gibbs*, 1 Y. & C. 145; *Daniell's Ch. Pr.* (5th Am. ed.) 714.

⁹ *Jenkinson v. Royston*, 5 Price, 496, 510; *Daniell's Ch. Pr.* (5th Am. ed.) 714.

¹⁰ *Carte v. Ball*, 3 Atk. 496, 499; *Comstock v. Herron*, 45 Fed. R. 660; *Daniell's Ch. Pr.* (5th Am. ed.) 714.

complainant's patent.¹¹ The defenses must be pleaded with sufficient certainty;¹² although it seems that the same degree of certainty is not required in an answer as in a bill,¹³ or a plea.¹⁴ It has been said that "the respondent cannot set up as a defense that if complainant's patent be so construed as to cover the machine made and sold by him, then the machine embraced in said patent was known and used prior to the invention thereof by the patentee."¹⁵ An averment that a patent "was obtained upon false and fraudulent representations by the plaintiffs, or some of them, made to the commissioner of patents, and is wholly void at law," is also too uncertain to be sufficient to constitute a defense.¹⁶ The general rule is that no affirmative defense can be proved unless it has been set up in the answer.¹⁷ In a suit to restrain the infringement of a patent, a license is an affirmative defense.¹⁸ It has been said that, if a defendant states in his answer certain facts as evidence of a particular case, which he represents to be the consequence of those facts, and upon which he rests his defense, he is not permitted afterwards to make use of the same facts, for the purpose of establishing a different defense from that to which, by his answer, he has drawn the plaintiff's attention.¹⁹ Thus it has been said that where fraud is set up in the answer "the party making the charge, if it is denied in a proper pleading, will be confined to that issue."²⁰

§ 145. **Defenses peculiar to Patent Cases.** — The Revised Statutes provide that the defendant to a suit in equity for relief against an alleged infringement of a patent may set up in his answer any one or more of the following defenses, and give notice therein that he will offer proof of the same: "First, that for the purpose of deceiving the public the description and specification filed by the patentee in the Patent Office was made to contain less than the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or, second, that he had

¹¹ *National Manuf. Co. v. Meyers*, 7 Fed. R. 355.

¹² *Graham v. Mason*, 4 Cliff. 88; *Armstrong v. Lear*, 8 Pet. 52.

¹³ *Daniell's Ch. Pr.* (5th Am. ed.) 714.

¹⁴ *Maury v. Mason*, 8 Porter (Ala.), 213, 228.

¹⁵ *Graham v. Mason*, 4 Cliff. 88.

¹⁶ *Clark v. Scott*, 5 Fisher, 245.

¹⁷ *Stanley v. Robinson*, 1 Russ. & M. 527; *Cummings v. Coleman*, 7 Rich.

(S. C.) Eq. 509, 520; *Burnham v. Darling*, 3 C. E. Green (18 N. J. Eq.), 132; *Daniell's Ch. Pr.* (5th Am. ed.) 712; *Black v. Thorne*, 10 Blatchf. 66, 84; *Sperry v. Erie Ry. Co.*, 6 Blatchf. 425.

¹⁸ *Watson v. Smith*, 7 Fed. R. 350.

¹⁹ *Langdell's Eq. Pl.* § 79; *Bennett v. Neale*, *Wightwick*, 324.

²⁰ *French v. Shoemaker*, 14 Wall. 314, 335. See § 70.

surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same ; or, third, that it had been patented or described in some printed publication prior to his supposed invention or discovery thereof ; or, fourth, that he was not the originator and first inventor or discoverer of any material and substantial part of the thing patented ; or, fifth, that it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public. And in notices as to proof of previous invention, knowledge, or use of the thing patented, the defendant shall state the names of patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented, or to have had the prior knowledge of the thing patented, and where and by whom it had been used ; and if any one or more of the special matters alleged shall be found for the defendant, a decree shall be entered in his favor with costs.”¹ Such a notice need not be under oath, and a consent to an order that the answer be considered as amended by the insertion of such defense and notice is a waiver of any further oath.² Under this statute, it has been held that no evidence can be admitted in support of any of these defenses, unless it has been properly pleaded and the requisite notice has been given to the complainant ;³ but that the respondent, after pleading these defenses or some of them, with the names of such of the persons therein referred to as he then knows, may also plead a general allegation, “that the same had been previously invented and known and used by many other persons, whose names are unknown to the respondent, which, when known, the respondent prays leave to insert and set forth in the answer.”⁴ Upon the subsequent discovery of any such persons, testimony concerning them may be taken, and leave obtained from the court to insert their names in the answer by amendment *nunc pro tunc*. An order to this effect may be obtained before or after the testimony has been taken.⁴ It seems that when a previous patent has not been referred to in an answer, such patent may still be

§ 145. ¹ U. S. R. S. § 4920.

² *Campbell v. Mayor of N. Y.*, 45 Fed. R. 243.

³ *Teese v. Huntington*, 23 How. 2 ; *Agawam Co. v. Jordan*, 7 Wall. 583 ; *Blanchard v. Putnam*, 8 Wall. 420 ; *Bates v. Coe*, 98 U. S. 31 ; *Pitts v. Edmonds*, 2 Fisher, 52,

54 ; *Salamander Co. v. Haven*, 3 Dill. 131 ; *Jennings v. Pierce*, 15 Blatchf. 42 ; *Williams v. Boston & A. R. R. Co.*, 17 Blatchf. 21 ; *Decker v. Grote*, 10 Blatchf. 331.

⁴ *Roemer v. Simon*, 95 U. S. 214, 220 ; *Brown v. Hall*, 6 Blatchf. 405.

proved, as evidence of a prior use of the invention, which has been properly pleaded,⁵ to show the state of the art at the date of the complainant's alleged invention.⁶ It is unsettled whether the defense of insufficient description can be set up without alleging an intent to deceive the public.⁷ It has been said concerning the defense of want of novelty: "Where the thing patented is an entirety, consisting of a separate device or of a single combination of old elements incapable of division or separate use, the respondent cannot make good the defense in question by proving that a part of the entire invention is found in one prior patent, printed publication, or machine, and another part in another, and so on indefinitely, and from the whole or any given number expect the court to determine the issue of novelty adversely to the complainant."⁸ "Defenses of the kind, if the thing patented is an entirety, incapable of division or of separate use, must be addressed to the invention, and not to a part of it, or to one or more claims of the patent, if less than the entire invention. More than one patent may be included in one suit, and more than one invention may be secured in the same patent; in which cases the several defences may be made to each patent in the suit, and to each invention, to which the charge of infringement relates."⁹ It has been said that a defense charging that the original patentee "fraudulently and surreptitiously obtained the patent for that which he well knew was invented by another, unaccompanied by the further allegation that the alleged first inventor was at the time using reasonable diligence in adapting and perfecting the invention, is not sufficient to defeat the patent, and constitutes no defense to the charge of infringement."¹⁰ The question whether a defendant has an interest in the patent which is the foundation of the bill, and whether he has a license to use such patent, cannot be considered unless specifically raised by plea or answer.¹¹

⁵ *Atlantic Works v. Brady*, 107 U. S. 192. But see *Parks v. Booth*, 102 U. S. 96, 105.

⁶ *American Saddle Co. v. Hogg*, 1 Holmes, 133; s. c. 6 Fisher, 67; *Stevenson v. Magowan*, 31 Fed. R. 824.

⁷ *Loom Co. v. Higgins*, 105 U. S. 580, 588, 589; *Grant v. Raymond*, 6 Pet. 218; *Whittemore v. Cutter*, 1 Gall. 429; *Lowell v. Lewis*, 1 Mason, 182; *Gray v. James*, Pet. C. C. 394.

⁸ Mr. Justice Clifford in *Parks v. Booth*, 102 U. S. 96, 104; citing *Bates v. Coe*, 98 U. S. 31.

⁹ Mr. Justice Clifford in *Parks v. Booth*, 102 U. S. 96, 104, 105.

¹⁰ Mr. Justice Clifford in *Agawam Co. v. Jordan*, 7 Wall. 583, 597.

¹¹ *Puetz v. Bransford*, 31 Fed. R. 458.

§ 146. **Admissions and Denials independent of Discovery.** — According to Professor Langdell, “If the defendant has no affirmative defense, the answer need contain nothing but discovery, unless the defendant proposes to offer a line of evidence in disproof of the bill which may take the plaintiff by surprise; in which case it will be prudent to indicate the nature of such evidence in the answer. This should be done also whenever it is at all doubtful whether the evidence establishes an affirmative defence or is in denial of the bill.”¹ Although the weight of authority is in support of the rule that a failure to deny an allegation in the bill does not operate as an admission of its truth, provided some answer is made,² it is more prudent and is customary, even when an answer under oath is waived, for the defendant to deny or admit every allegation in the bill; and out of abundant caution a general traverse denying the unlawful combination charged in the bill, and all other matters therein contained, is still often inserted after the specific denials.³ The statement that the respondent believes an allegation to be true is equivalent to an admission;⁴ but the statement that he has no knowledge upon the subject seems to be equivalent to a denial,⁵ although, if full discovery be required, it is subject to exception for insufficiency.⁶ The denial of a conclusion of law is of no effect.⁷ Thus, when the bill alleged that the defendant executed and delivered a deed, a denial by the defendant of its delivery, accompanied by an admission that he made the deed and placed it upon record, is equivalent to an admission of its delivery.⁸ There is no need of a denial of the common confederacy clause unless accompanied by special charges of combination.⁹ When defendants avoided answering specific interrogatories concerning a charged infringement, but merely denied the use of any ma-

§ 146. ¹ Langdell's Eq. Pl. § 79.

² *Young v. Grundy*, 6 Cranch, 51; *Brown v. Pierce*, 7 Wall. 205, 211; *Brooks v. Byam*, 1 Story, 296, 302; Rule 61. But see *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 318, 323; *Agawam Co. v. Jordan*, 7 Wall. 583, 609; *Webb v. Powers*, 2 W. & M. 497, 510; *Meyers v. Busby*, 32 Fed. R. 670.

³ See Story's Eq. Pl. § 870.

⁴ *Brooks v. Byam*, 1 Story, 296, 311.

⁵ *Brown v. Pierce*, 7 Wall. 205, 212; *Brooks v. Byam*, 1 Story, 296.

⁶ *Kittredge v. Claremont Bank*, 1 W. & M. 244.

⁷ *Adams v. Adams*, 21 Wall. 185; *Union Mutual Ins. Co. v. Commercial Mutual Marine Ins. Co.*, 2 Curt. 524; s. c. on appeal, as *Commercial Mutual Marine Ins. Co. v. Union Mutual Ins. Co.* 19 How. 318, 319.

⁸ *Adams v. Adams*, 21 Wall. 185.

⁹ Story's Eq. Pl. §§ 30 with note, and 856; Rule 32.

chinery "in violation and infringement of any rights of the plaintiff, or that they are using, or have made, or sold, or used any machines not protected or covered by the proviso in the act of Congress," it seems that they thereby presumptively admit infringement.¹⁰ An admission in an answer that the defendants had made locks of the kind described in the patent sued upon, "is satisfied, by assuming that the smallest number of locks were made consistent with the use of that word in the plural, and with the use by the defendants of any part of the patent which is valid."¹¹ An admission that a deed bears a certain date does not estop the respondent from showing that it was fraudulently antedated.¹²

§ 147. **Impertinence and Scandal.** — An answer should contain no impertinence or scandal.¹ What constitute scandal and impertinence has been explained in the chapter on Bills.² Usually nothing is considered scandalous which is relevant or responsive to the allegations of the bill.³ But in an English case brought by a clergyman, where the defendant included in a schedule of accounts a charge for money paid by him for an order of filiation of a bastard made upon the plaintiff, the court held the item, although relevant, a proper subject of exception, because the mode of bringing it forward was intended to drive the plaintiff out of his parish.⁴ It may be doubted whether so much respect for the cloth would be shown by an American court. An allegation that a previous decree was made "without a full reading of the proofs in the cause, or a careful consideration of the briefs of the counsel filed therein," and not "after full consideration," is not scandalous; for it contains no imputation upon the court.⁵ "Exceptions for impertinence are only allowed when it is apparent that the matter excepted to is not material or relevant, or is stated with needless prolixity. If it *may* be material, the exception will not be allowed, as that would leave the defendant without remedy, but the allegations excepted to will

¹⁰ *Agawam Co. v. Jordan*, 7 Wall. 583, 609.

¹¹ Mr. Justice Miller in *Jones v. Morehead*, 1 Wall. 155, 165. But compare *Troy Iron & Nail Factory v. Corning*, 6 Blatchf. 328, 336, 337.

¹² *Holbrook v. Worcester Bank*, 2 Curt. 244.

§ 147. ¹ Story's Eq. Pl. §§ 861-863; *Langdon v. Goddard*, 3 Story, 13.

² See § 68.

³ *Peck v. Peck*, Mosely, 45; *Woods v. Morrell*, 1 J. Ch. (N. Y.) 103, 106; *Fisher v. Owen*, L. R. 8 Ch. D. 645, 653; *Story's Eq. Pl.* § 862.

⁴ *Attorney-General v. Hewit*, in Chanc. July, 1801; cited in *Cooper's Eq. Pl.* 319; *Story's Eq. Pl.* § 862.

⁵ *Miller v. Buchanan*, 5 Fed. R. 366.

be allowed to remain in the answer, and the effect thereof, if found to be true, determined on the final hearing.”⁶ It has been held that a short sentence inserted out of abundant caution will not be expunged as impertinent.⁷ Neither is new matter not responsive to the bill, setting up an insufficient defense, the proper subject of an exception for impertinence;⁸ although such matter has been expunged by motion.⁹ A demurrer to an answer is not permitted.¹⁰ Exceptions to answers for scandal and impertinence are taken and disposed of in substantially the same manner as exceptions to bills for the same reasons.¹¹ Exceptions for impertinence should be filed and disposed of before exceptions for insufficiency are filed.¹²

§ 148. **Discovery.** — Discovery, or answer under oath, which was formerly one of the principal grounds of equitable jurisdiction, is now of little practical importance. For the statutes of the United States,¹ as well as those of all of the individual members of the American Union with which the writer has any acquaintance, allow the full benefits of discovery to be obtained by the oral examination of any party or person otherwise interested in the cause on trial. Moreover, a recent amendment to the equity rules provides that, “if the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore upon a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.”² (U. S. R. S.

⁶ Deady, J., in *Chapman v. School District No. 1*, Deady, 108, 110.

⁷ *Desplaces v. Goris*, 1 Edward's Ch. (N. Y.) 350.

⁸ *Adams v. Bridg. Iron Co.*, 6 Fed. R. 179; *Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co.*, 43 Fed. R. 391. But see *Ford v. Douglas*, 5 How. 143, 165.

⁹ *Armstrong v. Chem. Nat. Bank*, 37 Fed. R. 466; *Adams v. Bridg. Iron Co.*, 6 Fed. R. 179; *Gilchrist v. Helena, & Co.*, 47 Fed. R. 593.

¹⁰ *Crouch v. Kerr*, 38 Fed. R. 549.

¹¹ See Rules 26 and 27; *Hood v. Inman*, 4 J. Ch. (N. Y.) 437; *Langdon v. Goddard*, 3 Story, 13; § 68.

¹² *Patriotic Bank v. Bank of Washington*, 5 Cranch C. C. 602.

§ 148. ¹ U. S. R. S. § 858.

² Amendment of December, 1871, to Rule 41. See *Woodruff v. Dubuque & S. C. R. R. Co.*, 30 Fed. R. 91.

Sec. 858.) Consequently, an answer under oath is now usually waived by the complainant.³ When no such waiver is made, however, the old rule still prevails; and the sworn statement by the defendant in direct response to an allegation in the bill is deemed to be true, unless contradicted by two witnesses, or a single witness and corroborating circumstances.⁴ Irrespective allegations are not evidence.⁵ Neither are allegations upon information and belief,⁶ nor allegations sworn to positively, concerning facts of which it is evident that the respondent can have no personal knowledge.⁷ The admissions of the defendant are binding upon him; and unless he can obtain leave to amend his answers by withdrawing them, he cannot disprove them at the hearing.⁸ When discovery is required, the defendant must answer every allegation in the bill which is material to the plaintiff's case, and an answer admitting which would not expose him to a penalty, forfeiture, or criminal prosecution, or expose a privileged communication.⁹ "It is not a sufficient foundation of exception that a fact charged in a bill is not answered, unless the fact is material and might contribute to support the equity of the plaintiff's case, and induce the court to give the relief sought by the bill."¹⁰ The former practice required that if a defendant submitted to answer, he must in general answer fully; and that he could usually protect himself from a full discovery only by a plea or demurrer to the objectionable part of the bill.¹¹ Now, however, the Equity Rules provide that "the rule that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abate-

³ See *Slessinger v. Buckingham*, 17 Fed. R. 454, 456.

⁴ *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 153, 160; *Union Bank of Georgetown v. Geary*, 5 Pet. 99, 110; *Seitz v. Mitchell*, 94 U. S. 580, 582; *Vigel v. Hopp*, 104 U. S. 441; *Slessinger v. Buckingham*, 17 Fed. R. 454, 456.

⁵ *Sargent v. Larned*, 2 Curt. 340; *Seitz v. Mitchell*, 94 U. S. 580.

⁶ *Berry v. Sawyer*, 19 Fed. R. 286; *Allen v. O'Donald*, 28 Fed. R. 17.

⁷ *Clark's Executors v. Van Riemsdyk*,

9 Cranch, 153, 161; *Allen v. O'Donald*, 28 Fed. R. 17.

⁸ *Gold & Silver Ore Separating Co. v. U. S. Disintegrating Ore Co.*, 6 Blatchf. 307, 310. See *Troy Iron & Nail Factory v. Corning*, 6 Blatchf. 328, 336.

⁹ *Atwill v. Ferrett*, 2 Blatchf. 39.

¹⁰ Chief Justice Taney in *Hardeman v. Harris*, 7 How. 726.

¹¹ *Hare on Discovery*, pp. 247, 296, 297; *Story's Eq. Pl.* §§ 605, 606, 609, 846; *Mazarredo v. Maitland*, 3 Madd. 66, 72; — *v. Harrison*, 4 Madd. 252.

ment, or to the character of the parties, or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill, to avoid or repel the bar or defense. Thus, for example, a *bona fide* purchaser for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.”¹² “A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.”¹³ If the plaintiff is the only person who can enforce a penalty or forfeiture, and he waives it in his bill, the defendant may be compelled to answer disclosing his liability thereto.¹⁴ There has been much controversy as to whether the defendant to a bill demanding an account can be obliged to give discovery as to the account when he answers denying the equity of the bill and the complainant's right to an account.¹⁵ The better opinion seems to be that he can. Such is the doctrine of Professor Langdell,¹⁶ and of the last English case upon the subject.¹⁷ No discovery can be required of an infant,¹⁸ or other person under a disability;¹⁹ nor, it seems, of a corporation,²⁰ or a public officer when sued in his official capacity.²¹ But it has been held that, although a corporation can-

¹² Rule 39.

¹³ Rule 44.

¹⁴ Lord Uxbridge *v.* Staveland, 1 Ves. Sen. 56; Atwill *v.* Ferrett, 2 Blatchf. 39.

¹⁵ The authorities have been well collected by Chancellor Cooper in French *v.* Rainey, 2 Tenn. Ch. 640.

¹⁶ Langdell's Eq. Pl. §§ 70-73.

¹⁷ Elmer *v.* Creasy, L. R. 9 Ch. 69, 71.

¹⁸ Copeland *v.* Wheeler, 4 Brown Ch. C. 256; Lucas *v.* Lucas, 13 Ves. 274; Daniell's Ch. Pr. (2d Am. ed.) 214.

¹⁹ Micklethwaite *v.* Atkinson, 1 Coll 173.

²⁰ Union Bank of Georgetown *v.* Geary, 5 Pet. 99, 110; Wallace *v.* Wallace, Halst. (N. J.) Dig. 173; Smith *v.* St. Louis Mutual Life Ins. Co., 2 Tenn. Ch. 599; Burpee *v.* First National Bank, 5 Biss. 405. But see Kittredge *v.* Claremont Bank, 3 Story, 590; s. c. 1 W. & M. 245.

²¹ Davison *v.* Attorney-General, 5 Price, 398, note; Attorney-General *v.* Lambirth, 5 Price, 386, 398; U. S. *v.* McLaughlin, 24 Fed. R. 823.

not be compelled to answer under oath, it can be compelled to answer, and to answer fully.²² The defendant must answer specifically and categorically, distinguishing between matters within his personal knowledge and those within his information and belief.²³ If he asserts ignorance as to any matter, he must aver that he is ignorant both of his own knowledge and as to information and belief.²⁴ He cannot deny that he has no knowledge as to a subject which the bill charges as a personal transaction in which he took part.²⁵ This last rule, it has been said, applies to officers of corporations.²⁶ If new officers have succeeded those in office at the time when the matters charged are said to have occurred, it is their duty, when called upon for discovery, to ascertain the facts by searching the records of the corporation and by inquiry of their predecessors.²⁷ It has been said that "a corporate answer should be made by the principal officer of the corporation, who should be able to admit or deny the facts charged and interrogated about, or to state want of knowledge clearly and truly as a reason for not doing it."²⁸ It is insufficient to deny any "recollection or belief as to a transaction in which the defendant is said to have been personally engaged."²⁹ "The defendant in his answer must state the facts as they then are."³⁰ But where a bill charged that the defendant would in future infringe a patent as he was charged to have done before, it was held insufficient for him to merely deny that he had done so since the trial of an action at law which established the complainant's rights.³¹ He had also to answer as to his future intentions.³² In drawing such an answer, it is usual and often advantageous to interweave the discovery with a narrative of the transactions from the defendant's point of view in a continuous statement, so that it will be hard for the plaintiff to read as evidence the defendant's admis-

²² *Hale v. Continental Life Insurance Company*, 16 Fed. R. 718; s. c. 20 Fed. R. 344.

²³ *Brooks v. Byam*, 1 Story, 296; *Kittredge v. Claremont Bank*, 3 Story, 596; s. c. 1 W. & M. 244.

²⁴ *Brooks v. Byam*, 1 Story, 296; *Kittredge v. Claremont Bank*, 1 W. & M. 244.

²⁵ *Burpee v. First National Bank*, 5 Biss. 405.

²⁶ *Burpee v. First National Bank*, 5 Biss. 405; *Kittredge v. Claremont Bank*, 1 W. & M. 244.

²⁷ *Kittredge v. Claremont Bank*, 1 W. & M. 244.

²⁸ *Wheeler, J.*, in *Hale v. Continental Life Insurance Co.*, 16 Fed. R. 718, 719.

²⁹ *Taylor v. Luther*, 2 Sumner, 228.

³⁰ *Sir Thomas Plumer, V. C.*, in *Knight v. Matthews*, 1 Madd. 566.

³¹ *Poppenhusen v. N. Y. Gutta-Percha Comb Co.*, 4 Blatchf. 185; s. c. 2 Fisher, 74.

³² *Poppenhusen v. N. Y. Gutta-Percha Comb Co.*, 4 Blatchf. 185; s. c. 2 Fisher, 74.

sions without also reading the latter's own explanation and account of the controversy.

§ 149. **Proceedings to compel Answer.**—The defendant must file in the clerk's office on the rule-day next succeeding that of entering his appearance, an answer to so much of the bill as he does not cover by a plea or demurrer. In default thereof, unless his time to answer has been enlarged, for cause shown by a judge of the court, upon motion for that purpose, the bill may be taken against him *pro confesso*.¹ When a plea or demurrer is overruled, with leave to the defendant to answer within a certain time, and he fails so to do, the bill may then also be taken *pro confesso*.² Otherwise the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, is entitled to process of attachment against the defendant to compel an answer, and the defendant, when arrested upon such process, is not discharged therefrom unless upon filing his answer, or otherwise complying with such order as the court or judge thereof may direct, as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.³ If the attachment is returned *non est inventus*, a commission of rebellion will issue.⁴ If this proves insufficient, it will be followed by a writ of sequestration.⁵

§ 150. **Frame of Answer.**—An answer should be entitled in the cause, so as to agree with the names of the parties as they appear in the bill at the time the answer is filed.¹ It seems that the defendant may not correct or alter the names of the parties as they appear in the bill, and that if there is a mistake he must correct it in the part following the title of the cause; thus, "The answer of the defendants, the Mayor, Aldermen, and commonalty in the bill called the Mayor, Aldermen, and citizens of the city of New York."² The answer should begin substantially thus: "The answer of John Aber, one of the above-named defendants, to the bill of complaint of the above-named plaintiff;" if the bill has been amended after answer, "to the amended bill of com-

§ 149. ¹ Rule 18. See Chapter VI.

² *Snydam v. Beals*, 4 McLean, 12.

³ Rule 18.

⁴ *Boudinot v. Symmes*, Wall. C. C. 139; *Smith's Ch. Pr.* (2d ed. A. D. 1837), 183-186.

⁵ *Smith's Ch. Pr.* (2d ed. A. D. 1837) 183-188.

§ 150. ¹ *Daniell's Ch. Pr.* (5th Am. ed.) 731.

² *Attorney-General v. Worcester Corporation*, 1 C. P. Cooper, 18; *Daniell's Ch. Pr.* (5th Am. ed.) 731.

plaint.”³ If two or more defendants join in the same answer, it usually begins, “The joint and several answer;”⁴ unless they are husband and wife, when it is “The joint answer”⁵ but an answer is not defective if put in by several as a joint answer merely.⁶ When discovery is required, all of the defendants who join in an answer must swear to the same.⁷ When the same solicitor is employed for two or more defendants, and separate answers are filed, or other proceedings had by two or more defendants separately, costs are allowed for such separate answers or other proceedings, unless a master, upon reference to him, certifies that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.⁸ A female defendant who has married since the filing of the bill usually begins: “The answer of John Aber and Anna, his wife, lately in the bill called Anna Brown, spinster,” or widow, as the case may be.⁹ A title, “The several answer of John Peck, Esq., one of the defendants to the bill of complaint of Anna Baines, alias Green, assuming to herself the name of Anna Peck, as pretended wife of John Peck, Esq., deceased, and of Anna Maria Green, assuming to herself the name of Anna Maria Peck, as daughter of the said John Peck, Esq., deceased,” was held scandalous.¹⁰ An answer by a person defending by guardian or next friend should state that fact: “James Fifield by Edward Jennings, his next friend.” When an answer and another pleading are united, it should so state: “The demurrer, plea, and answer of,” &c.¹¹ Next followed formerly a clause reserving to the defendant any and all advantages that might be taken by exception to the bill.¹² This always was and still is useless,¹³ although many practitioners still use it. Then comes the substantive part of the answer, setting up the matters of affirmative defense and giving the discovery required.¹⁴ The answer usually closes with a general traverse inserted out of abundant caution, denying the unlawful combination charged in the bill, and all other matters therein

³ Daniell's Ch. Pr. (5th Am. ed.) 731; Rigby v. Rigby, 9 Beav. 311, 313.

⁴ Davis v. Davidson, 4 McLean, 136.

⁵ Daniell's Ch. Pr. (5th Am. ed.) 731.

⁶ Davis v. Davidson, 4 McLean, 136.

⁷ Bailey Washing Machine Co. v. Young, 12 Blatchf. 199.

⁸ Rule 62.

⁹ Daniell's Ch. Pr. (5th Am. ed.), 731.

¹⁰ Peck v. Peck, Mosely, 45.

¹¹ Daniell's Ch. Pr. (5th Am. ed.), 731.

¹² Mitford's Pl. ch. 2, § 2, part 3. Story's Eq. Pl. § 870.

¹³ Story's Eq. Pl. § 870; Rules 39, 44.

¹⁴ Mitford's Pl. ch. 2, § 2, part 3.

contained.¹⁵ In the answers of infants and other persons under a disability, the reservation and general traverse have always been deemed properly omitted.¹⁶ The answer in such cases generally is that the infant knows nothing of the matter, and therefore neither admits nor denies the charges, but leaves the plaintiff to prove them as he shall be advised, and throws himself on the protection of the court.¹⁷ But if such a defendant has any substantive defence, he should plead the same.¹⁸

§ 151. **Signature and Oath to Answer.** — An answer must be signed by the defendant making it; even, it seems, when an answer under oath has been waived,¹ unless he answer by guardian, when the latter should sign it,² or unless an order has been obtained dispensing with such signature on account of the defendant's absence, or for some other reason.³ A person answering in a dual capacity need sign but once.⁴ An answer by a corporation must be under its corporate seal.⁵ In such a case it is advisable to have the seal attested by one of the corporate officers.⁶ When an answer is made without oath, the signature of the defendant should also be attested.⁷ This is usually done by his solicitor.⁸ The answer, unless it is taken by commissioners, should also be signed by counsel.⁹ Unless an answer under oath is waived in the bill, the defendant, if a natural person, must swear;¹⁰ or, "if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him."¹¹ The oath or affirmation may be taken before a justice or judge of any court of the United States, or before a commissioner appointed by a Circuit Court to take testimony or depositions, or before a master in chancery appointed by a Cir-

¹⁵ Mitford's Pl. ch. 2, § 2, part 3; Story's Eq. Pl. § 870.

¹⁶ Story's Eq. Pl. § 871.

¹⁷ Chancellor Kent in *Mills v. Dennis*, 2 J. Ch. (N. Y.), 367, 368.

¹⁸ *Holden v. Hearn*, 1 Beav. 445, 455; *Lane v. Hardwicke*, 9 Beav. 148, 149.

§ 151. ¹ Story's Eq. Pl. § 875; *Davis v. Davidson*, 4 McLean, 136; *Bayley v. De Walkers*, 10 Ves. 441; *Fulton Bank v. Beach*, 2 Paige (N. Y.), 307; *Denison v. Bassford*, 7 Paige (N. Y.), 370.

² *Anon*; 2 J. & W. 553; *Daniell's Ch. Pr.* (5th Am. ed.) 733.

³ Story's Eq. Pl. § 875; — *v. Lake*, 6 Ves. 171; — *v. Gwillim*, 6 Ves. 285.

⁴ *Anon*; 2 J. & W. 553.

⁵ *Haight v. Proprietors of the Morris Aqueduct*, 4 Wash. 601, 605; *Daniell's Ch. Pr.* (5th Am. ed.) 735, and note 2.

⁶ *Daniell's Ch. Pr.* (5th Am. ed.) 735, note 2.

⁷ *Daniell's Ch. Pr.* (5th Am. ed.) 738.

⁸ *Daniell's Ch. Pr.* (5th Am. ed.) 738.

⁹ *Davis v. Davidson*, 4 McLean, 136; *Story's Eq. Pl.* § 876.

¹⁰ *Fulton Bank v. Beach*, 2 Paige (N. Y.), 307; *Daniell's Ch. Pr.* (5th Am. ed.) 735.

¹¹ Rule 91. See U. S. R. S. § 5013.

cuit Court, or before a judge of a court of a State or Territory;" or before a notary public, when acting within the limits of their respective jurisdictions.¹² An answer can be verified without the United States before commissioners appointed for that purpose;¹³ or probably before any secretary of legation or consular officer at the post, port, place, or within the limits of his legation, consulate, or commercial agency.¹⁴ The following form of oath or affirmation is given by Daniell in his valuable work on Chancery Practice: "You swear, or solemnly affirm, that what is contained in this your answer (or plea and answer), as far as concerns your own act and deed, is true to your own knowledge, and that what relates to the act and deed of any other person or persons, you believe to be true."¹⁵ When sworn to in a foreign country, it seems that it must be "administered in the most solemn form observed by the laws and usages" of that country.¹⁶ Every alteration and interlineation in the answer should be authenticated by the initials of the officer who administers "the oath." When the verification of an answer is in the form of an affidavit, the name of the defendant making it must be subscribed at the foot of the affidavit. When in the form of a certificate of the officer administering the oath, the defendant's name should be subscribed at the foot of the answer.¹⁷

§ 152. **Motions to take Answers off the File.** — When an answer is in any respect irregular,¹ or is filed by a person not named as a defendant in the bill,² or is filed too late, it may upon the plaintiff's motion be taken off the file.³ This may also be done when the paper purporting to be an answer is so evasive that it is in fact no answer.⁴ If it is taken off the file for an error in form, the court may allow the same paper to be corrected, and then filed anew.⁵ By setting the cause down for a hearing

¹² Rule 59. L. 1876, ch. 204.

¹³ *Read v. Consequa*, 4 Wash. 335.

¹⁴ U. S. R. S. § 1750. But see *Read v. Consequa*, 4 Wash. 335.

¹⁵ 2 Daniell's Ch. Pr. ch. 15 § 2, p. 270; Story's Eq. Pl. § 872, note 4.

¹⁶ *Read v. Consequa*, 4 Wash. 335.

¹⁷ Daniell's Ch. Pr. (5th Am. ed.) 743; *Hathaway v. Scott*, 11 Paige (N. Y.), 173, 176; *Pincers v. Robertson*, 9 C. E. Green (24 N. J. Eq.), 348.

§ 152. ¹ *Bailey Washing Machine Co. v. Young*, 12 Blatchf. 199.

² *Putnam v. New Albany*, 4 Biss. 365, 367.

³ *Allen v. The Mayor and Board of Education of New York*, 18 Blatchf. 239.

⁴ *Tomkin v. Lethbridge*, 9 Ves. 178; *Smith v. Searle*, 14 Ves. 415.

⁵ *Bailey Washing Machine Co. v. Young*, 12 Blatchf. 199.

upon bill and answer, or by filing exceptions or the general replication, such a defect would be waived.⁶ A failure to enter an order taking a bill as confessed, does not authorize the filing of an answer after the prescribed time.⁷

§ 153. **Exceptions for Insufficiency.** — After an answer is filed on any rule-day, the plaintiff is allowed until the next rule-day to file in the clerk's office exceptions thereto for insufficiency, and no longer, unless a longer time is allowed for the purpose, upon cause shown to the court or a judge thereof: and if no exceptions are filed thereto within that period, the answer is deemed and taken to be sufficient.¹ The time may, however, under extraordinary circumstances be abridged by the court.² The court may, to avoid delay, allow the bill to be amended, and exceptions to be filed at the same time to the answer to the original bill; requiring the defendant to at once answer the amended bill and the exceptions.³ Exceptions to an answer for insufficiency can be filed after exceptions for impertinence have been filed and disposed of.⁴ It seems that, if a plea is ordered to stand for an answer, without leave to accept being granted in the order, no exception for insufficiency can be taken to so much of the answer as is covered by the plea;⁵ and that where an answer is accompanied by a demurrer or plea to the discovery, and the complainant excepts to the answer before the other pleading has been disposed of, he thereby admits the latter to be good, and, if set down for argument, it may be stricken off the calendar.⁶ In the latter case leave to withdraw the exceptions may be given.⁷ No exceptions for insufficiency can be filed to the answer of an infant or other person under a disability.⁸ It has been held that exceptions will lie for insufficiency, and discovery may be required although an answer under oath is waived.⁹ After exceptions for

¹ *Fulton Bank v. Beach*, 2 Paige (N. Y.), 307; *Glassington v. Thwaites*, 2 Russell, 458, 461.

² *Allen v. Mayor*, 7 Fed. R. 483.

³ § 153. 1 Rule 61.

⁴ *Read v. Consequa*, 4 Wash. 335.

⁵ *Kittredge v. Claremont Bank*, 3 Story, 590.

⁶ *Patriotic Bank v. Bank of Washington*, 5 Cranch C. C. 602.

⁷ *Sellon v. Lewen*, 3 P. Wms. 239.

⁸ *Brownell v. Curtis*, 10 Paige (N. Y.) 210, 211; *Mitf. Pl. ch. 2, § 2, part 3.*

See, however, *Darnell v. Reyny*, 1 Vern. 344.

⁷ *Boyd v. Mills*, 13 Ves. 85.

⁸ *Copeland v. Wheeler*, 4 Brown, Ch. C. 256; *Lucas v. Lucas*, 13 Ves. 274; *Micklethwaite v. Atkinson*, 1 Collyer, 173; *Daniell's Ch. Pr.* (5th Am. ed.) 169.

⁹ *Uhlmann v. Amholt & Schaeffer Brewing Co.*, 41 Fed. R. 369; *Colgate v. Compagnie Francaise*, 23 Fed. R. 82. But see *United States v. McLaughlin*, 24 Fed. R. 823; *McCormick v. Chamberlin*, 11

insufficiency have been filed, no new exceptions can regularly be added;¹⁰ but leave to amend those on file may under special circumstances be obtained.¹¹ When defendants answer separately, separate exceptions should be filed to each answer.¹² Exceptions to an answer for insufficiency must be in writing,¹³ and signed by counsel.¹⁴ It seems that they must specify that the answer excepted to is an answer to the bill.¹⁵ They should state the charges in the bill and the interrogatory applicable thereto, to which the exceptionable part of the answer should be addressed, and then state the terms of that part of the answer *verbatim*, so that the court, without searching the bill and answer throughout, may at once perceive the ground of the exception, and ascertain its sufficiency.¹⁶ An exception to an answer, "because, in stating in the said answer what he has been informed of by the said Byam, he does not say whether he actually believes the same to be true," was said to be irregular in form.¹⁷ Such an objection, or any irregularity in the form of an exception for insufficiency, can be raised by a motion to take the exception off the file.¹⁸ By setting the exception down for a hearing, an objection for irregularity is waived.¹⁹ Where exceptions have been filed to an answer for insufficiency, within the period prescribed, if the defendant do not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff should forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and should enter, as of course, in the order-book an order for that purpose; and if he do not so set down the same for a hearing, the exceptions are deemed abandoned, and the answer deemed sufficient; but the court or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions or for answering the same, in his discretion, upon such terms as he may deem reasonable.²⁰ It has been said

Paige (N. Y.) 543; Sheppard v. Akers, 1 Tenn. Ch. 326.

¹⁰ Partridge v. Haycraft, 11 Ves. 570, 575.

¹¹ Dolder v. Bank of England, 10 Ves. 284; Bancroft v. Wentworth, 10 Ves. 285 n.; Northcote v. Northcote, 1 Dick. 22.

¹² Sydolph v. Monkston, 2 Dick. 609.

¹³ Brooks v. Byam, 1 Story, 296; Yates v. Hardy, Jacob, 223; Woods v. Morrell, 1 J. Ch. (N. Y.) 103.

¹⁴ Yates v. Hardy, Jacob, 223.

¹⁵ Earl of Lichfield v. Bond, 5 Beav. 513.

¹⁶ Brooks v. Byam, 1 Story, 298, 303; Bower Barff Rustless Iron Co. v. Wells Rustless Iron Co., 43 Fed. R. 391.

¹⁷ Brooks v. Byam, 1 Story, 298, 303.

¹⁸ Yates v. Hardy, Jacob, 223; Williams v. Davies, 1 Sim. & S. 426.

¹⁹ Brooks v. Byam, 1 Story, 298, 303.

²⁰ Rule 63.

that to refer such exceptions to a master on a day not a rule-day "is to do what is not authorized by the rules, and, unless affirmed or cured by some subsequent action of the court, is a nullity."²¹ If, at the hearing, the exceptions are allowed, the defendant is bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff will, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody upon such writ, cannot be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.²² If, upon argument, the plaintiff's exceptions are overruled, or the answer adjudged insufficient, the prevailing party is entitled to all the costs thereby occasioned, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.²³ An exception for insufficiency may be allowed in part and overruled in part.²⁴ Where an exception for insufficiency was sustained, and a further answer put in, which the plaintiff deemed still insufficient, by the former English practice he had three weeks wherein to refer the same to a master upon the old exceptions; otherwise the further answer was deemed sufficient.²⁵ If the further answer was found insufficient, the defendant was required to put in a third answer; and if that too was found insufficient, he was committed to the Fleet, and examined upon interrogatories.²⁶ When an order was obtained after answer, allowing the plaintiff to amend his bill, and requiring the defendant to answer the amendments and the exceptions to the answer to the original bill together; upon such answer the plaintiff could only file new exceptions for a failure to fully answer the amendments.²⁷ A further answer is in every respect similar, and is considered a part of the original answer. If, therefore, it repeats any matter contained in a former answer, the repetition, unless it varies the

²¹ *La Vega v. Lapsley*, 1 Woods, 428, 432, Woods, J. 247; *Hoffmann v. Postill*, L. R. 4 Ch. App. 673.

²² Rule 64.

²⁵ *Smith Ch. Pr.* (2d ed. 1836), 285.

²³ Rule 65.

²⁶ *Smith Ch. Pr.* (2d ed. 1836), 285, 286.

²⁴ *E. I. Co. v. Campbell*, 1 Ves. Sen.

²⁷ *Partridge v. Haycraft*, 11 Ves. 570, 581; *Smith Ch. Pr.* (2d ed. 1836), 286.

defence in point of substance, or is otherwise necessary, is considered as impertinent.²⁸ The criterion of the materiality of an interrogatory is not whether an affirmative answer will prove the bill, but whether it will tend to prove the bill.²⁹

§ 154. **Supplemental Answers.** — A supplemental answer is filed to bring to the attention of the court some fact which was not inserted in the original answer through mistake or ignorance,¹ or which has occurred subsequently to the filing of the same.² They can only be filed by leave of the court, which may impose terms upon the applicant.³ The rules regulating supplemental answers of the former class will be found in the chapter upon Amendments. Those of the second class have been little considered in the books. Their functions may also be performed by cross-bills.⁴ It is too late after answer and decree to object to the regularity of a proceeding in which facts were set up by petition when a cross-bill or supplemental answer would have been the proper practice.⁵

§ 155. **Disclaimers.** — A disclaimer is a pleading by which the defendant renounces all claim to property which the plaintiff seeks in his bill to obtain.¹ It is said that it is distinct in its substance from an answer, although sometimes confounded with one.² It must, however, in most cases be accompanied by an answer, for where a defendant has been made a party by mistake, having had an interest with which he has parted, the plaintiff may require an answer sufficient to ascertain what the facts are, and to whom he has transferred his interest.³ Moreover, a defendant, although he may disclaim an interest, cannot disclaim a liability.⁴ The only cases in which a disclaimer without an answer is sufficient seem to be those where the bill simply

²⁸ Story's Eq. Pl. § 808. See *Gier v. Gregg*, 4 McLean, 203.

²⁹ *Uhlmann v. Amholt & S. Brewing Co.*, 41 Fed. R. 369. See *supra*, § 82.

§ 154. ¹ *Smith v. Babcock*, 3 Sumner, 583; *Williams v. Gibbes*, 20 How. 535; *Caster v. Wood, Baldwin*, 289; *Suydam v. Truesdale*, 6 McLean, 459.

² *Kelsey v. Hobby*, 16 Pet. 269, 277; *Talmage v. Pell*, 9 Paige (N. Y.), 410, 413.

³ *Smith v. Babcock*, 3 Sumner, 583; *Caster v. Wood, Baldwin*, 289.

⁴ *Kelsey v. Hobby*, 16 Pet. 269, 277; *infra*, § 171.

⁵ *Kelsey v. Hobby*, 16 Pet. 269, 277; *Coburn v. Cedar Valley Land & Coal Co.*, 138 U. S. 196, 222.

§ 155. ¹ *Mounsey v. Burnham*, 1 Hare, 15.

² Story's Eq. Pl. § 838.

³ Story's Eq. Pl. § 838. See *Ellsworth v. Curtis*, 10 Paige (N. Y.), 105; *Carrington v. Lentz*, 40 Fed. R. 18.

⁴ *Glassington v. Thwaites*, 2 Russ. 458; *Graham v. Coape*, 9 Simons, 93, 102; s. c. 3 Myl. & Cr. 638.

alleges that the defendant claims an interest in the property in question without specifying the claim.⁵ Under very special circumstances, a disclaimer may be withdrawn, and an answer filed setting up a claim.⁶ Where a disclaimer is made, and it appears that the defendant was made a party without apparent reason, the bill will be dismissed with costs.⁷ Otherwise, a decree may be entered without costs against the defendant and all claiming under him since the filing of the bill.⁸ The plaintiff should not file a replication to a disclaimer alone.⁹ When the disclaimer is insufficient it may be stricken off the file upon motion, or exceptions to it for insufficiency, if filed, will be sustained.¹⁰ A disclaimer may be accompanied by a plea, answer, or demurrer, or all of these, provided that each refers to a separate part of the bill.¹¹ If a disclaimer and answer by the same defendant are inconsistent, the matter will be taken most strongly against the defendant upon the disclaimer.¹² The following is a form of a mere disclaimer: "The disclaimer of Richard Flagg, the defendant, to the bill of complaint of Robert Aber, complainant. This defendant, saving and reserving to himself [here follows the usual general reservation in an answer], saith, that he doth not know that he, this defendant, to his knowledge and belief, ever had, nor did he claim or pretend to have, nor doth he now claim, any right, title, or interest of, in, or to the estates and premises, situate [describing them], in the said complainant's bill set forth, or any part thereof; and this defendant doth disclaim all right, title, and interest to the said estate and premises in [naming their situation], in the said complainant's bill mentioned, and every part thereof." A disclaimer concludes in the same way as an answer.¹³

⁵ Story's Eq. Pl. § 838. See *Graham v. Coape*, 9 Simons, 93, 102; s. c. 3 Myl. & Cr. 638.

⁶ Story's Eq. Pl. § 841.

⁷ Story's Eq. Pl. § 842.

⁸ Story's Eq. Pl. § 842.

⁹ Story's Eq. Pl. § 842.

¹⁰ *Graham v. Coape*, 9 Simons, 93, 102; s. c. 3 Myl. & Cr. 638.

¹¹ Story's Eq. Pl. § 839; Mitford's Pl. ch. 2, § 2, part 3.

¹² Mitford's Pl. ch. 2, § 2, part 2.

¹³ Story's Eq. Pl. § 844, note 6.

CHAPTER XI.

REPLICATIONS.

§ 156. **Definition and History of Replications.**—A replication is a pleading by which the plaintiff puts in issue the matters pleaded in a defendant's answer or plea. No replication can be filed to a demurrer.¹ Replications were formerly of two kinds, general and special.² A general replication consists of a general denial of the truth of the defendant's plea or answer, and of the sufficiency of the matter alleged therein to bar the plaintiff's suit, together with an assertion of the truth and sufficiency of the bill.³ A special replication sets up new matter in avoidance of a substantive defence contained in the answer or plea.⁴ To this the defendant was obliged to file a rejoinder, giving the discovery required in it.⁵ This might then be succeeded by a sur-rejoinder and a rebutter.⁶ Special replications and their consequences were, on account of the inconvenience therefrom resulting, almost obsolete by the time of Lord Eldon.⁷ A special replication to an answer is forbidden by the Equity Rules, which provide that "no special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court or a judge thereof may in his discretion direct."⁸ It has been held, that a special replication is equally improper to a plea.⁹ Allegations of new matter in a replication will therefore be disregarded, and the pleading, if allowed to remain upon the file, will be given no more effect than if it were simply general.¹⁰ The proper course, however, is for the de-

§ 156. ¹ *Mason v. Hartford, Providence, & Fishkill R. R. Co.*, 10 Fed. R. 334.

² Mitford's Pl. ch. 3.

³ Story's Eq. Pl. § 878.

⁴ Story's Eq. Pl. § 878.

⁵ Mitford's Pl. ch. 3; Story's Eq. Pl. § 878.

⁶ Mitford's Pl. ch. 3; Story's Eq. Pl. § 878.

⁷ Mitford's Pl. ch. 3; Story's Eq. Pl. § 878.

⁸ Rule 45.

⁹ *Mason v. Hartford, Providence & Fishkill R. R. Co.*, 10 Fed. R. 334.

¹⁰ *Vattier v. Hinde*, 7 Pet. 252, 273;

fendant to move the special replication off the file.¹¹ After the disuse in England of special replications, it was customary for the plaintiff to sue out and serve upon the defendant a subpoena to rejoin.¹² This practice never prevailed generally in the United States;¹³ and the Equity Rules provide that "in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side."¹⁴

§ 157. **When a Replication should be Filed.** — The equity rules provide that if the plaintiff does not reply to any plea, or set it down for argument on the rule-day when the same is filed, or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose.¹ Whenever the answer of the defendant is not excepted to, or is adjudged or deemed sufficient, the plaintiff must file the general replication thereto on or before the next succeeding rule-day thereafter.² If the plaintiff omits or refuses to file such replication within the prescribed period, the defendant is entitled to an order, as of course, for a dismissal of the suit; and the suit is thereupon dismissed, unless the court, or a judge thereof, shall, upon motion for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause and to such other terms as may be directed.³ It has been held that such an order may be entered by the clerk without any application to the judge.⁴ No replication need or should be filed when the cause is set down for hearing upon bill and answer.⁵ Where there are several defendants a replication should be filed within the prescribed time after one of them has filed an answer or plea, although the others may not have done so.⁶ It is the safer practice to file a separate replication after the other answers have come in.⁷ The court may grant leave to withdraw a replication, and amend, or have the cause set down

Dupont v. Mussy, 4 Wash. 128; Wren v. Spencer Optical Manuf. Co., 18 Off. Gaz. 857.

¹¹ Mason v. Hartford, Providence & Fishkill R. R. Co., 10 Fed. R. 334.

¹² Story's Eq. Pl. § 879.

¹³ Story's Eq. Pl. § 879, note 5.

¹⁴ Rule 66.

§ 157. ¹ Rule 38.

² Rule 66.

³ Rule 66.

⁴ Robinson v. Satterlee, 3 Saw. 134.

⁵ Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405; Gaines v. Agnelly, 1 Woods, 238.

⁶ Coleman v. Martin, 6 Blatchf. 291.

⁷ See Smith's Ch. Pr. (2d Eng. ed.) vol. i. p. 336.

for a hearing upon bill and answer.⁸ It has been held that the pendency of a motion affecting the plea or answer will excuse the plaintiff from replying before the motion has been decided.⁹ Only a party whose plea or answer has received no proper reply can have a bill dismissed for a failure to comply with these rules.¹⁰ The court exercises great liberality in allowing a replication to be filed *nunc pro tunc*,¹¹ or in allowing one filed too late to stand.¹² The taking of testimony by the defendant, or any other proceeding taken by him in the cause, would probably be held a waiver of his right to have a bill dismissed for want of a replication.¹³ An objection upon this ground cannot be raised for the first time upon appeal.¹⁴ After a cause has been heard upon bill and answer the court will rarely allow a replication to be filed.¹⁵

§ 158. **Effect of a Replication.** — The complainant, by filing a general replication, admits the sufficiency as regards discovery,¹ but not as a defense,² of the plea or answer to which it is filed, and denies every allegation in the plea or answer which is not directly responsive to the bill.³

§ 159. **Frame of a Replication.** — The full title of the cause, as it stands at the time the replication is filed, must be set forth in the heading of the replication, but only the names of such of the defendants as have appeared should be inserted or referred to in the body. If a defendant's name has been misspelt by the plaintiff, and such defendant has corrected the same by his answer, but the plaintiff has not afterwards amended his bill with respect to such name, the correction should be shown in the title of the replication; in the body of the replication, however,

⁸ Rogers v. Goore, 17 Ves. 139; Brown v. Ricketts, 2 J. Ch. (N. Y.) 425; Daniell's Ch. Pr. (2d Am. ed.) 479; *Ibid* (3d Am. ed.) 830.

⁹ Allis v. Stowell, 5 Fed. R. 203.

¹⁰ Chicago & Alton R. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 717.

¹¹ Pierce v. West's Executors, Pet. C. C. 351; Sayles v. Erie Railway Co., 2 N. J. L. J. 212; Fischer v. Hayes, 6 Fed. R. 76; s. c. 19 Blatchf. 26; Jones v. Brittan, 1 Woods, 667.

¹² Fischer v. Hayes, 6 Fed. R. 76; s. c. 19 Blatchf. 26.

¹³ Jones v. Brittan, 1 Woods, 667; Fischer v. Hayes, 6 Fed. R. 76; s. c. 19

Blatchf. 26; Reynolds v. Crawfordsville First Nat. Bank, 112 U. S. 405.

¹⁴ Clements v. Moore, 6 Wall. 299; Fretz v. Stover, 22 Wall. 198.

¹⁵ Bullinger v. Mackey, 14 Blatchf. 355; Peirce v. West's Executors, Pet. C. C. 351.

§ 158. ¹ Story's Eq. Pl. § 877; Hughes v. Blake, 6 Wheat. 453.

² Rule 33; Matthews v. Lalance & G. Manuf. Co., 2 Fed. R. 232. But see Myers v. Dorr, 13 Blatchf. 22; Theberath v. Rubber & Celluloid Harness Trimming Co., 5 Bann. & A. 584.

³ Humes v. Scruggs, 94 U. S. 22.

the correct name only should be inserted. When any defendant has died since the bill was filed, the words "since deceased" should follow his name in the title, but his name should be omitted in the body of the replication. If the plaintiff joins issue with all the defendants their names need not be repeated in the body; it is sufficient in such case to designate them as "all the defendants;" but if he does not join issue with all, the names of the defendants must be set out in the body.¹ If the defendant has filed both a plea and answer, the replication should refer to both.² The body of a general replication is substantially as follows: "This repliant, saving and reserving to himself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants for replication thereunto, saith, that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law, to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed."³ A replication should be signed by the plaintiff's solicitors. The signature of counsel is unnecessary.⁴ A replication, like all other papers in a suit in equity, should contain no scandal or impertinence. Proceedings thereon on account of its containing scandalous or impertinent matter are similar to those upon an answer of that character. In Queen Elizabeth's time, the plaintiff, for putting in too long a replication, was fined ten pounds, and imprisoned, and a hole made through the replication, which was hung about his neck, while he was obliged to go thus carrying it from bar to bar.⁵

§ 159. ¹ Daniell's Ch. Pr. (4th Am. ed.) 830, 831.

² Niccol v. Wiseman, 2 Vern. 46.

³ Story's Eq. Pl. § 878, note 4.

⁴ Story's Eq. Pl. § 881; Daniell's Ch. Pr. (4th Am. ed.) 830.

⁵ Milward v. Welden, 8 Eliz. li. B. fo. 678; Tothill, 101.

CHAPTER XII.

AMENDMENTS.

§ 160. **Amendments in General.** — “In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said, generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to technical rules of practice. Undoubtedly great caution should be exercised where the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side.”¹ The Revised Statutes provide that the court “may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe.”² States,³ charities,⁴ infants,⁵ idiots, and lunatics, are allowed to amend in cases where courts might hesitate to grant the privilege to others.

§ 161. **When Bills can be Amended.** — The equity rules regulate the amendment of bills as follows: “The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk’s office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point, as he may do of course, after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay

§ 160. ¹ Mr. Justice Harlan in *Hardin v. Boyd*, 113 U. S. 756, 761. See *Nellis v. Pennock Manuf. Co.*, 38 Fed. R. 379.

² U. S. R. S. § 954.

³ *Rhode Island v. Massachusetts*, 13 Pet. 23.

⁴ *President of St. Mary Magdalen’s College v. Sibthorp*, 1 Russ. 151.

⁵ *Serle v. St. Eloy*, 2 P. Wms. 386; *Pritchard v. Quinchant, Ambler*, 147; *Story’s Eq. Pl.* §§ 59, 892.

to the defendant the costs occasioned thereby, and shall, without delay, furnish him with a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish in like manner to the defendant a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.”¹ For the purposes of this rule, an answer which has been held or admitted to be insufficient is, it seems, considered as no answer.² It has been held that, after an insufficient answer, the complainant cannot amend by leaving out the defendant’s name, and thus discontinuing the suit without costs.³ After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff’s submitting to such other terms as may be imposed by the judge for speeding the cause.⁴ This rule applies only where leave to amend is asked before a demurrer or plea is allowed.⁵ “If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his amendments or amended bill, as the case may require, in the clerk’s office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.”⁶ “No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have

§ 161. ¹ Rule 28.

⁴ Rule 29.

² Daniell’s Ch. Pr. (2d Am. ed.) 473.
See *Chase v. Dunham*, 1 Paige (N. Y.), 572.

⁵ *National Bank v. Carpenter*, 101 U. S. 567, 568.

³ *Chase v. Dunham*, 1 Paige (N. Y.), 572.

⁶ Rule 30.

leave to amend the same with or without the payment of costs, as the court or a judge thereof may in his discretion direct.”⁷ Such an amendment must be asked for whenever the plaintiff wishes to avoid and not merely deny a defense in the answer which has not been anticipated in the original bill.⁸ Thus, where an answer to a bill for an injunction against the infringement of a patent set up a license, the complainant was not allowed to prove the abandonment of the license because the bill contained no allegation to that effect.⁹ If upon a hearing any demurrer or plea is allowed, the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable.¹⁰ When the plaintiff wishes to amend the bill after replication by the addition of new facts or charges, the regular practice is for him to apply for leave to withdraw his replication and amend.¹¹ An amendment may be allowed by the court at any time even after a final decree.¹²

§ 162. **Form and Effect of Amendment of a Bill.** — “Wherever leave to amend the bill is granted, it is more proper to file an amended bill than to interline the original bill, particularly if some of the defendants had before answered that bill.”¹ “The rule is that the amended bill should state no more of the original bill than may be necessary to introduce, and to make intelligible, the new matter, which should alone constitute the chief subject of the bill. The reasons for this rule are obvious. Not only is the incorporating of the old bill into the amended bill unnecessary, but it increases the costs, and exposes the defendants, particularly those who have answered the original bill, to the trouble of searching out and separating the old from the new matter, at the peril of having their answer excepted to if any mistake should happen, and all the matter of the amended bill should not be answered.”² Accordingly, an amended bill which was obnoxious to this rule was held impertinent.³ It is the better practice for the counsel to sign the amendments, if they are not as to matters of mere form.⁴ The amendment of a bill is usually considered

⁷ Rule 45.⁸ *Wilson v. Stolley*, 4 McLean, 275; *Piatt v. Vattier*, 9 Pet. 405.⁹ *Wilson v. Stolley*, 4 McLean, 275.¹⁰ Rule 35.¹¹ *Daniell's Ch. Pr.* (2d Am. ed.) 479.¹² *Tremaine v. Hitchcock*, 23 Wall. 518.§ 162. ¹ *Peirce v. West's Executor*, 3 Wash. 354, 355.² *Peirce v. West's Executor*, 3 Wash. 354, 355.³ *Peirce v. West's Executor*, 3 Wash. 354, 355.⁴ *Daniell's Ch. Pr.* (5th Am. ed.) 313.

as an admission of the sufficiency of the answer as regards discovery;⁵ but an amendment which merely brings in a new defendant does not have this effect;⁶ and the court may, to prevent delay, entertain a motion to amend a bill in equity at the same time that exceptions to the answer are filed, and may then require the defendant to answer the amendments and the exceptions together.⁷ An amendment of a bill, at least before answer, will not, it seems, dissolve an injunction previously granted.⁸ It is, however, the usual and the safer practice to have a clause inserted in the order stating that the amendment may be made without prejudice to the injunction.⁹ Unless otherwise provided in the order, it seems that an amendment of a bill will discharge all contempt proceedings previously instituted.¹⁰

§ 163. **What Amendments to Bills may be made.** — “An amendment should rarely if ever be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs.”¹ Thus, where a bill was filed for the enforcement of a judgment lien upon specified property filed against certain specified defendants, an amendment was refused after a hearing, when it was sought to seek discovery and relief against all purchasers of both the property referred to in the original bill and other property of the judgment debtor.² A bill to restrain the infringement of a patent cannot be amended so as to allege that the title to the patent is in a different person from the one who in the original bill is alleged to hold it.³ But such a bill may be amended so as to set up a reissue of the original patent, which occurred before the original bill was filed, but was not mentioned therein.⁴ Such a bill may also be amended so as to include claims for damages and profits due previous owners of the patent, who have assigned them to the complainant.⁵ The allegation that certain machines

⁵ Smith's Ch. Pr. (2d Eng. ed.) 307.

⁶ Taylor v. Wrench, 9 Ves. 315.

⁷ Kittredge v. Claremont Bank, 3 Story, 590.

⁸ Read v. Consequa, 4 Wash. 174, 180; Smith's Ch. Pr. (2d Eng. ed.) 306; Daniell's Ch. Pr. (5th Am. ed.) 424, 425.

⁹ Read v. Consequa, 4 Wash. 174; Daniell's Ch. Pr. (5th Am. ed.) 424, 425.

¹⁰ Smith's Ch. Pr. (2d Eng. ed.) 305; Gray v. Campbell, 1 R. & M. 323; Symonds v. Duchess of Cumberland, 2 Cox, 411.

§ 163. ¹ Mr. Justice Harlan in *Hardin v. Boyd*, 113 U. S. 756, 761.

² *Snead v. McCoull*, 12 How. 407, 422.

³ *Goodyear v. Bourn*, 3 Blatchf. 266.

See *Rylands v. LaTouche*, 2 Bligh, 586.

⁴ *The Tremolo Patent, Tremaine v. Hitchcock*, 23 Wall. 518; *Reay v. Raynor*, 19 Fed. R. 308; *Reay v. Berlin & Jones Envelope Co.*, 30 Fed. R. 448. But see *Jones v. Barker*, 11 Fed. R. 597.

⁵ *New York Grape Sugar Co. v. Buffalo Grape Sugar Co.*, 20 Fed. R. 505.

alleged to be used in violation of a patent were infringements when made, may also be added by amendment.⁶ It was held that a bill for a new trial of an action for the price of stock alleged to have been sold the defendant, could not be changed by amendment so as to charge that the defendant held the stock in trust for the complainant.⁷ It is unsettled whether a bill for discovery can be amended so as also to pray relief.⁸ It was held that a bill filed against persons in their individual capacity cannot be amended so as to sue them as officers of a corporation.⁹ A bill filed by several creditors praying the sale of their debtor's land in one State, and the satisfaction of their claims out of the proceeds of such sale, cannot be changed by amendment so as to pray relief to one against another of the plaintiffs, in respect to the receipt by the latter of the proceeds of the sale of other land of the same debtor situated in another State, and sold under a decree in another suit in another court.¹⁰ A bill by the Land Company of New Mexico to enforce an executory contract by the defendant Smoot for the sale of an interest in land of which the defendant Elkins had the legal title, and which it was alleged that Smoot was about to assign to the defendant Butler with Elkins's connivance, was held not amendable "by omitting all the parties but Elkins, and proceeding against him upon the theory that complainant has acquired Smoot's interest by an absolute and unconditional transfer."¹¹ A bill to set aside a sheriff's sale may be amended so as to add a tender of the purchase-price and a prayer for a redemption of property.¹² A bill to set aside a contract for the sale of land as obtained by fraud may be amended by the addition of an alternative prayer for the specific performance of the contract.¹³ A bill to remove a cloud upon the title to land may be amended so as to seek the enforcement of trusts relating to the same property.¹⁴ It has been said,

⁶ *Reay v. Raynor*, 19 Fed. R. 308.

⁷ *Oglesby v. Attrill*, 14 Fed. R. 214.

⁸ See *Horsburg v. Baker*, 1 Pet. 232; *Butterworth v. Bailey*, 15 Ves. 358; *Hildyard v. Cressy*, 3 Atk. 303; *Crow v. Tyrrell*, 2 Madd. 397; *Jackson v. Strong*, 1 McClel. 245; *Lousada v. Templer*, 2 Russ. 565; *Daniell's Ch. Pr.* (2d Am. ed.) 463-465.

⁹ *Tyler v. Galloway*, 13 Fed. R. 477. But see *Womersley v. Merritt*, L. R. 4 Eq. 635.

¹⁰ *Smith v. Woolfolk*, 115 U. S. 143, 148.

¹¹ *Land Co. of New Mexico v. Elkins*, 20 Fed. R. 545.

¹² *Graffam v. Burgess*, 117 U. S. 180.

¹³ *Hardin v. Boyd*, 113 U. S. 756, distinguishing *Shields v. Barrow*, 17 How. 136.

¹⁴ *Partee v. Thomas*, 11 Fed. R. 769. See also *Neale v. Neales*, 9 Wall. 1; *Battle v. Mutual Life Ins. Co.*, 10 Blatchf. 417; *Burgess v. Graffam*, 10 Fed. R. 216.

that where the bill originally sets out one agreement which it seeks to enforce, and the answer admits the execution of another agreement of a similar character, but with provisions different from those alleged in the bill, the plaintiff may amend, abandoning the agreement first pleaded by him, and obtain the enforcement of that admitted by the defendant; but that he cannot, while still praying the enforcement of the agreement as set out by him, amend so as to seek, in case he fail in proving that, an enforcement of the one admitted in the answer.¹⁵ A cross-bill may be amended so as to radically change the ground of the relief sought, when the proofs which make the amendment necessary have been furnished by the complainant in support of the latter's original bill.¹⁶ It was held that a creditor's bill, filed to obtain the appointment of a receiver of the property of a city, and the application by him of its assets to the satisfaction of its debts, could not be amended so as to seek relief against a receiver and back-tax collector, appointed by a subsequent statute of the State to collect the city's assets.¹⁷ When the suit was begun in a Federal court, that court may allow an amendment setting forth the facts essential to the Federal jurisdiction.¹⁸ Allegations in a *remittitur* filed after judgment cannot be considered as amendments to the pleading.¹⁹ Great liberality is allowed as to amendments which strike out parties,²⁰ or bring in new parties,²¹ except as to bills for discovery, to which in England no new parties could be added.²² A bill filed by a married woman can almost always be amended by the addition of the name of a next friend when necessary.²³ A bill filed on behalf of one's self and others may be amended by striking out the invitation to others to join, provided none of them have come in; ²⁴ and a bill filed in one's own name may be amended by the addition of words sufficient to make it a bill in behalf of a class.²⁵ A bill filed against

¹⁵ *Lindsay v. Lynch*, 2 Sch. & Lef. 1, 9.

¹⁶ *Chicago, M. & St. P. Ry. Co. v. Third National Bank of Chicago*, 134 U. S. 276, 289.

¹⁷ *Moriwether v. Garrett*, 102 U. S. 472, 502. But see *Richmond v. Irons*, 121 U. S. 27.

¹⁸ *Continental Ins. Co. v. Rhoads*, 119 U. S. 237; *Halsted v. Buster*, 119 U. S. 341; *Denny v. Pironi*, 141 U. S. 121, 124.

¹⁹ *Denny v. Pironi*, 141 U. S. 121.

²⁰ *Conolly v. Taylor*, 2 Pet. 556; *Dwight v. Humphreys*, 3 McLean, 104.

²¹ *Fisher v. Rutherford*, Baldwin, 188; *Patterson v. Stapler*, 7 Fed. R. 210.

²² *Marquis Cholmondeley v. Lord Clinton*, 2 Meri. 71.

²³ *Douglas v. Butler*, 6 Fed. R. 228.

²⁴ *Yates v. Arden*, 5 Cranch C. C. 526.

²⁵ *Richmond v. Irons*, 121 U. S. 27; *Good v. Blewitt*, 13 Ves. 397, 401; *Attorney-General v. Newcombe*, 14 Ves. 1, 6;

a defendant as executor may be amended so as to charge him as administrator of the same person.²⁵ In an English case, a bill in behalf of a charity was changed by amendment into an information.²⁷

§ 164. **Amendment by Pleading Matters subsequent to the Filing of the Bill.** — The general rule is that nothing which has occurred since the filing of a bill can be added to it by amendment.¹ Such matters, when admissible, should ordinarily be introduced by a supplemental bill.² It was held incompetent to amend a bill, stating that certain notes and mortgages were executed under a threat by the defendant that he would kill the complainant if they were not executed and paid at their maturity, by adding the allegation, "that in pursuance of such threat the defendant did, subsequently to the commencement of this suit, take the life of the original complainant."³ Such a murder does not add to the complainant's cause of action, although it might be put in evidence as tending to prove the original duress.⁴ An amendment therefore speaks as of the date of the original bill; and an amendment alleging the requisite difference of citizenship in the present time is sufficient to establish the jurisdiction of the court.⁵ A bill may perhaps be amended before answer, demurrer, or plea, by alleging new matter that has occurred since it was first filed.⁶ And it has been held that where a plaintiff has, at the time of filing his original bill, an inchoate right, to perfect which a formal act alone is necessary, and such formal act is not performed till afterwards; as where an executor files a bill before probate, and subsequently proves the testament,⁷ or the next of kin files a bill to protect the personal estate of an intestate and subsequently procures her appointment as administratrix,⁸ or a foreign administrator files a bill before obtaining ancillary letters of administration, and such letters are subsequently issued

Reese River Silver Mining Co. v. Atwell,
L. R. 7 Eq. 347.

²⁵ *Randolph v. Barrett*, 16 Pet. 138.

²⁷ *President of St. Mary Magdalen College v. Sibthorp*, 1 Russ. 154.

§ 164. ¹ *Wray v. Hutchinson*, 2 Myl. & K. 235; *Mason v. Hartford*, *Providence & Fishkill R. R. Co.*, 10 Fed. R. 334; *Copen v. Fleisher*, 1 Bond, 440; *Lyster v. Stickney*, 12 Fed. R. 609.

² See Chapter XIV.

³ *Lyster v. Stickney*, 12 Fed. R. 609, 610.

⁴ *Lyster v. Stickney*, 12 Fed. R. 609.

⁵ *Birdsall v. Perego*, 5 Blatchf. 251.

⁶ *Story's Eq. Pl.* § 885; *Candler v. Pettit*, 1 Paige (N. Y.), 168; *Ogden v. Gibbons*, *Halst. N. J. Dig.* 172.

⁷ *Belloat v. Morse*, 2 Hayw. (N. C.) 157; *Daniell's Ch. Pr.* (2d Am. ed.) 460.

⁸ *Humphreys v. Humphreys*, 3 P. Wms. 348; *Bradford v. Felder*, 2 M'Cord (S. C.), Ch. 170.

to him;⁹ the introduction of the fact by amendment will be permitted.¹⁰ It has been also held in England that the "defendant, when he puts in his answer, must state the facts as they *then* are; and if circumstances are then introduced in the answer which occurred subsequent to the filing of the bill, the plaintiff must be allowed to make amendments to the bill, so as to show that such new circumstances mentioned in the answer are not of the color he represents them, and so as to obtain a complete answer as to such circumstances."¹¹

§ 165. **Proceedings upon an Amended Bill.** — When the amendment merely brings in new parties defendant, they alone need be served with a new subpoena.¹ If, however, a bill is substantially amended by the addition of new charges, according to the English practice a subpoena to answer the amendments had to be sued out and served upon all the defendants.² Where the bill is amended before answer or plea, no matter how trivial the amendment may be, the defendant may demur to it, although a demurrer to the original bill has been overruled.³ If, however, a defendant has answered the original bill, he cannot, without obtaining leave to withdraw his first answer, demur, plead, or answer to any more than the new matter, unless the amendments virtually make a new case.⁴ For if the answer which still remains upon the record applies to any part of the amended bill, it will overrule a general demurrer.⁵ Where the amendments seek to introduce new matter which is properly the subject of a supplemental bill, the defendant must raise that objection by demurrer,⁶ plea, or answer.⁷ Otherwise, the objection will be waived.⁸ The equity rules provide that, "In any case where an amendment shall

⁹ *Swatzel v. Arnold*, Woolw. 338; *Black v. Henry G. Allen Co.*, 42 Fed. R. 618, 624. *Contra*, *Mason v. Hartford, Providence & Fishkill R. R. Co.*, 10 Fed. R. 334.

¹⁰ *Daniell's Ch. Pr.* (2d Am. ed.) 460, 461; *Swatzel v. Arnold*, Woolw. 383; *Black v. Henry G. Allen Co.*, 42 Fed. R. 618, 624; *Humphreys v. Humphreys*, 3 P. Wms. 348. *Contra*, *Mason v. Hartford, Providence & Fishkill R. R. Co.*, 10 Fed. R. 334.

¹¹ *Sir Thomas Plumer, V. C.*, in *Knight v. Matthews*, 1 Maccl. 566.

§ 165. ¹ *Longworth v. Taylor*, 1 Mc-

Lean, 514; *Angerstein v. Clarke*, 1 Ves. Jr. 250; *Skeffington v. —*, 4 Ves. 66.

² *Cooke v. Davies, T. & R.* 209; *Bramston v. Carter*, 2 Simons, 458. See *Kendall v. Beckett*, 1 Russ. 152.

³ *Bosanquet v. Marsham*, 4 Simons, 573; *Bancroft v. Warden*, 2 Dickens, 672.

⁴ *Keene v. Wheatley*, 9 American Law Register, 33, 60; *Atkinson v. Hanway*, 1 Cox Eq. 360; *Ellice v. Goodson*, 3 M. & C. 653; *Ritchie v. Aylwin*, 15 Ves. 79.

⁵ *Ellice v. Goodson*, 3 M. & C. 653.

⁶ *Brown v. Higden*, 1 Atk. 291.

⁷ *Wray v. Hutchinson*, 2 M. & K. 235.

⁸ *Archbishop of York v. Stapleton*, 2 Atk. 136.

be made after answer filed, the defendant shall put in a new answer or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer."⁹ An answer to an amended bill is impertinent if it contains any matter which was pleaded in the answer to the bill before amendment.¹⁰ It seems to have been the English rule that an answer to an amended bill might set up an entirely new defense inconsistent with that in his former answer.¹¹ The court may after amendment refuse leave to file an answer which does not plead a defense to the new matter.¹²

§ 166. **Amendments of Demurrers, Pleas, and Replications.** — The court may allow a demurrer to be amended as to matters of form,¹ and also in substance by narrowing² its extent, and otherwise. When a substantial amendment of a demurrer is allowed, it is customary to give the plaintiff leave to amend his bill at the same time.³ An amendment of a plea, except as to a matter of form,⁴ is less frequently allowed; and only upon an application in which the court must be told precisely what the amendment is to be, and how the slip happened which it is to correct.⁵ In such a case, the defendant is usually given a very short time within which to amend.⁶ The amendment of a replication will almost always be allowed.⁷

§ 167. **Amendment of Answers.** — The equity rule affecting the amendment of answers is as follows: "After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn at any time before a replication is put in, or the cause set down for hearing

⁹ Rule 46.

¹⁰ *Gier v. Gregg*, 4 McLean, 202.

¹¹ Daniell's Ch. Pr. (2d Am. ed.) 468; citing *Bolton v. Bolton*, MS. See also *Trust & Fire Insurance Co. v. Jenkins*, 8 Paige (N. Y.), 589.

¹² *Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank of Chicago*, 134 U. S. 270, 289.

§ 166. ¹ U. S. R. S. § 954.

³ *Gregg v. Legh*, 4 Madd. 193, 207; *Atwill v. Ferrett*, 2 Blatchf. 39, 49; *Baker*

v. Mellish, 11 Ves. 70; *Story's Eq. Pl.* § 894.

³ *Gregg v. Legh*, 4 Maddock, 193, 207; *Atwill v. Ferrett*, 2 Blatchf. 39, 49.

⁴ U. S. R. S. § 954.

⁵ *Story's Eq. Pl.* § 895. See *Giant Powder Co. v. Safety Nitro Powder Co.*, 19 Fed. R. 509.

⁶ *Story's Eq. Pl.* § 895.

⁷ Daniell's Ch. Pr. (4th Am. ed.) 831.

upon bill and answer. But after replication, of such setting down for hearing, it shall not be amended in any material matters, as by adding new matters, facts, or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require that the same be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.”¹ The principles upon which the courts proceed in allowing such amendments is thus stated by Judge Story. “In mere matters of form, or mistakes of dates, or verbal inaccuracies, courts of equity are very indulgent in allowing amendments. But when application is made to amend an answer in material facts, or to change essentially the grounds taken in the original answer, courts of equity are exceedingly slow and reluctant in acceding to it. To support such applications, they require very cogent circumstances, and such as to repel the notion of any attempt of the party to evade the justice of the cause, or to set up new and ingeniously contrived defenses or subterfuges. When the object is to let in new facts and defenses wholly dependent upon parol evidence, the reluctance of the court is greatly increased, since it has a natural tendency to encourage carelessness and indifference in making answers, and leaves much room for the introduction of testimony manufactured for the occasion. But when the new facts sought to be introduced are written papers or documents, which have been omitted by accident or mistake, there the same reason does not apply in its full force; for such papers and documents cannot be made to speak a different language from that which originally belonged to them. The whole matter rests in the sound discretion of the court.”² “It seems to me that before any court of equity should allow such amended answers, it should be perfectly satisfied that the reasons assigned for the application are cogent and satisfactory; that the mistakes to be corrected, or the facts to be added are made highly probable, if not certain; that they are material to the merits of the case in controversy; that

§ 167. ¹ Rule 60.

² *Smith v. Babcock*, 3 Sumner, 583, 586.

the party has not been guilty of gross negligence; and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party, since the original answer was put in and sworn to. Where the party relies upon new facts which have come to his knowledge since the answer was put in, or where it is manifest that he has been taken by surprise, or where the mistake or omission is manifestly a mere inadvertence and oversight, there is generally less reason to object to the amendment than there is where the whole bearing of the facts and evidence must have been well known before the answer was put in."³ An amendment of an answer changing the character of the defense will rarely be allowed after the court has rendered an opinion adverse to the position originally taken by the defendant.⁴ The defendant will rarely be allowed to withdraw an admission which he has made.⁵ Leave to amend will be denied when the complainant proves by affidavit that the new matter sought to be introduced is false.⁶ Ordinarily, leave to amend an answer will be denied when the defendant knew of the facts which he wishes to introduce, at the time his original answer was drawn;⁷ or might have then discovered them by the exercise of reasonable diligence.⁸ An omission due to a mistake of law cannot ordinarily be cured by amendment.⁹ The court may refuse to allow an amendment which would introduce an unconscientious defense, such as the statute of limitations,¹⁰ the statute of frauds,¹¹ or that a contract made by a complainant corporation was not authorized by its charter.¹² When the proposed amendment is trivial the answer may be removed from the file, altered, resworn to, and refiled;¹³ but if it is of any length, it is customary to file a supplemental answer setting it forth.¹⁴

³ *Smith v. Babcock*, 3 Sumner, 583, 586.

⁴ *Calloway v. Dobson*, 1 Brock. 119. See *Walden v. Bodley*, 14 Pet. 156; *Hamilton v. Nevada G. & S. Min. Co.*, 33 Fed. R. 562, 568.

⁵ *Ruggles v. Eddy*, 11 Blatchf. 524.

⁶ *Hicks v. Otto*, 17 Fed. R. 539.

⁷ *India Rubber Comb Co. v. Phelps*, 8 Blatchf. 85; *Webster Loom Co. v. Higgins*, 13 Blatchf. 349; *Cross v. Morgan*, 6 Fed. R. 241; *Suydam v. Truesdale*, 6 McLean, 459.

⁸ *India Rubber Comb Co. v. Phelps*,

8 Blatchf. 85; *Webster Loom Co. v. Higgins*, 13 Blatchf. 349.

⁹ *Webster Loom Co. v. Higgins*, 13 Blatchf. 349; *Cross v. Morgan*, 6 Fed. R. 241.

¹⁰ *Cock v. Evans*, 9 Yerg. (Tenn.) 287.

¹¹ *Cook v. Bee*, 2 Tenn. Ch. 344.

¹² *Third Avenue Savings Bank v. Dimock*, 9 C. E. Green (24 N. J. Eq.), 26.

¹³ *Bailey Washing Machine Co. v. Young*, 12 Blatchf. 199.

¹⁴ *Dolder v. Bank of England*, 10 Ves. 284, 285; *Daniell's Ch. Pr.* (5th Am. ed.) 779, 780.

Leave to withdraw an answer and file a demurrer or plea may¹⁵ but very rarely will be granted.¹⁶

§ 168. **Practice in obtaining Leave to Amend.** — The application for leave to amend must be in writing, stating the new matter which the applicant desires to introduce by amendment, and must be supported by an affidavit, stating the reason why this matter was not included in the original pleading.¹ Where the former pleading was verified, oath must be made to the truth of the proposed amendments.² Where the proposed amendment consists of matters disclosed by documentary evidence, the documents themselves must be produced if possible.³ The court may impose terms as a condition precedent to amendment; for example, a disclosure of the names of the witnesses whom the party expects to call to prove the new matter.⁴ The order allowing the amendment should state the new matter to be inserted.⁵ If the amended pleading states new matter not allowed by the order, it may be stricken from the file.⁶ The court upon appeal will disregard an amended pleading filed without leave,⁷ unless the other party has treated it as valid, when he cannot raise the objection for the first time upon appeal.⁸ When both parties have conducted the case as if the pleadings contained certain allegations therein omitted, an amendment inserting such allegations may be allowed at almost any stage of the cause.⁹ The Supreme Court may,¹⁰ but rarely will,¹¹ reverse a decree for an error in refusing permission to make an amendment; never unless the proposed amendment appears upon the record.¹² It has been said that a decree will not be reversed for an error in allowing an amendment.¹³ The Supreme Court will not allow a pleading to be

¹⁵ *U. S. v. American Bell Tel. Co.*, 39 Fed. R. 716.

¹⁶ *Phelps v. Elliott*, 30 Fed. R. 396.

§ 168. ¹ *Snead v. McCoull*, 12 How. 407, 422; *National Bank v. Carpenter*, 101 U. S. 567, 568; *Wells v. Wood*, 10 Ves. 491; *Nabob of the Carnatic v. East India Co.*, 1 Ves. Jr. 374, 385; *Rodgers v. Rodgers*, 1 Paige (N. Y.), 424; *Daniell's Ch. Pr.* (5th Am. ed.) 781.

² *Rodgers v. Rodgers*, 1 Paige (N. Y.), 424.

³ *Churton v. Frewen*, L. R. 1 Eq. 238; *Daniell's Ch. Pr.* (5th Am. ed.) 781.

⁴ *Caster v. Wood*, 1 Baldwin. 289.

⁵ *Daniell's Ch. Pr.* (5th Am. ed.) 410.

⁶ *Strange v. Collins*, 2 V. & B. 163, 167.

⁷ *Terry v. McLure*, 103 U. S. 442.

⁸ *Clements v. Moore*, 6 Wall. 299.

⁹ *Tremaine v. Hitchcock*, 23 Wall. 518.

¹⁰ *Riddle v. Whitehill*, 135 U. S. 621, 627, 640.

¹¹ *National Bank v. Carpenter*, 101 U. S. 567, 568. But see *Riddle v. Whitehill*, 135 U. S. 621, 627, 640.

¹² *National Bank v. Carpenter*, 107 U. S. 567, 668.

¹³ *Chapman v. Barney*, 129 U. S. 677, 681.

amended upon appeal to it¹⁴ except by consent.¹⁵ It has been held, however, that a Circuit Court has power to allow an amendment to a pleading when hearing an appeal from a District Court.¹⁶

¹⁴ *Pacific Railroad of Mo. v. Ketchum*,
95 U. S. 1.

¹⁵ *Kennedy v. Georgia State Bank*, 8
How. 586.

¹⁶ *Warren v. Moody*, 9 Fed. R. 673.

CHAPTER XIII.

CROSS-BILLS.

§ 169. **Definition and Origin of Cross-Bills.** — A cross-bill is a bill filed by a defendant in a suit in equity against one or more of the other parties, in order to obtain either discovery of facts in aid of his defence, or complete relief to all parties as to the matters charged in the original bill.¹ It was borrowed, through the canon, from the *reconventio* of the later civil law;² and from it is derived the counterclaim of code-pleading.³ It was originally used chiefly for the purpose of set-off and discovery, which modern statutory enactments have made it now possible to obtain in a simpler way.

§ 170. **When a Cross-Bill should be Filed.** — A cross-bill is filed by one of the defendants to a suit in equity either for his own protection, or by the direction of the court at the hearing, if the pleadings are then insufficient to enable it to determine the rights of all the parties sufficiently to make a complete decree upon the subject-matter of the suit.¹ This latter case most frequently happens when persons in opposite interests are co-defendants. Although a defendant can by his answer obtain the benefit of any defense he may have against the plaintiff's claim, he can, except in a very few cases, obtain no relief against the latter in the same suit beyond what results necessarily from the denial of the prayer of the original bill.² "If the facts which a defendant wishes to set up destroy the plaintiff's apparent cause of action, they constitute a defense, and should be set up by answer or plea; but if they only furnish a reason why the court should make a decree depriving the

§ 169. ¹ Mr. Justice Nelson in *Ayres v. Carver*, 17 How. 591, at page 595.

² Story's Eq. Pl. § 402; Langdell's Eq. Pl. §§ 152, 154.

³ See *Brande v. Gilchrist*, 18 Fed. R. 465.

§ 170. ¹ Langdell's Eq. Pl. § 124; Daniel's Ch. Pr. (5th Am. ed.) 1550;

Field v. Schieffelin, 7 J. Ch. (N. Y.) 250.

² *Carnochan v. Christie*, 11 Wheat. 446; *Ford v. Douglas*, 5 How. 143; *Chapin v. Walker*, 6 Fed. R. 794; *Brande v. Gilchrist*, 18 Fed. R. 465; *Denver & R. G. Ry. Co. v. Denver, S. P. & P. R. Co.*, 17 Fed. R. 867.

plaintiff of his cause of action, they must be set up by a cross-bill; and in the latter case the defendant's answer to the original bill should strictly contain nothing but discovery."³ Where the plaintiff's right depends upon an instrument or conveyance which is not void, but merely voidable on account of fraud or otherwise, the defendant can in most cases only set up the facts showing its invalidity by a cross-bill.⁴ In a suit to set aside a contract, the defendant cannot have the contract enforced unless he files a cross-bill.⁵ It has been held that a discharge in bankruptcy must be pleaded in a cross-bill.⁶ There are very few cases⁷ in which a court can give one defendant relief against another, unless the former files a cross-bill.⁸ In a case where the original bill prayed a confirmation of a title under a deed absolute in form, a cross-bill by one of the defendants, claiming that the deed be declared a trust deed for her sole benefit, was held to be germane to the subject-matter of the suit, and sufficient to support a decree binding the other defendants as well as the plaintiff.⁹ No party is obliged to file a cross-bill unless the court orders him to do so. Otherwise, he may seek by an independent bill the relief which he desires.¹⁰ A cross-bill may be filed at any time before the final hearing if not at any time before the final decree.¹¹

§ 171. **When a Cross-Bill should not be Filed.** — There are two important classes of cases in which the court gives relief to the defendant without a cross-bill. Suits for an account, in which, if it finally appears that the balance is in favor of the defendant, the court will give him a decree for the sum found to be due to him;¹ and bills for the specific performance of contracts, in

³ Langdell's Eq. § 155.

⁴ *Ford v. Douglas*, 5 How. 143; *Langdell's Eq. Pl.* § 131; *Jacobs v. Richard*, 18 Beav. 300; *Beddoes v. Pugh*, 26 Beav. 407, 416, 417; *Holderness v. Rankin*, 2 De Gex, F. & J. 258; *Eddleston v. Collins*, 3 De Gex, M. & G. 1, 16; *Chapin v. Walker*, 2 McCrary, 175. But see *Dayton v. Melick*, 27 N. J. Eq. (12 C. E. Green) 362; *Pitts v. Powledge*, 56 Ala. 147; *Kennedy v. Green*, 3 My. & K. 699, 718; *Eyry v. Hughes*, 2 Ch. D. 148; *Osborne v. Barge*, 30 Fed. R. 805.

⁵ *Meissner v. Buck*, 28 Fed. R. 161; *Carnochan v. Christie*, 11 Wheaton, 446, 447.

⁶ *Banque Franco-Egyptienne v. Brown*, 24 Fed. R. 106, 107.

⁷ *Smith v. Woolfolk*, 115 U. S. 143, 148; *Chamley v. Lord Dunsany*, 2 Sch. & Lef. 690, 718; *Conry v. Caulfield*, 2 Ball & Beatty, 255; *Elliott v. Pell*, 1 Paige (N. Y.), 263; *Langdell's Eq. Pl.* §§ 155, 156. See § 172.

⁸ *Langdell's Eq. Pl.* §§ 155, 156; *Talbot v. McGee*, 4 Monroe (Ky.), 375, 379; *Beach v. Rice*, 131 U. S. 293.

⁹ *Kingsbury v. Buckner*, 134 U. S. 650, 677.

¹⁰ *Washburn & Moen Manuf. Co. v. Scutt*, 22 Fed. R. 710.

¹¹ *Neal v. Foster*, 34 Fed. R. 496; *Rogers v. Reissner*, 31 Federal Reporter, 592.

§ 171. ¹ *Clarke v. Tipping*, 4 Beav. 588;

which, if the parties differ as to the terms of the contract, and that question is decided in the defendant's favor, the court will compel the plaintiff to perform the contract thus established.² But these exceptions illustrate the rule; for they proceed distinctly upon the theory that the court only entertains such bills upon the condition that the plaintiff will consent to the same justice being rendered to the defendant that he asks for himself; and formerly this consent was required to be expressly given in the bill.³ So, when a question had been fully litigated between a plaintiff and one defendant, and it appeared that the latter was liable, not to the former, but to a co-defendant, who was himself liable to the plaintiff to the same extent, the court has allowed a decree in favor of the latter defendant against the other without the filing of any cross-bill.⁴ "When the decision of a controversy between a plaintiff and two defendants raises an incidental and collateral question between the co-defendants, the court will sometimes dispose of the latter by means of a reference to a master, and thus save the expense of a separate suit,⁵ and the same course has been taken when it was impossible to give the plaintiff the relief to which he was entitled without first deciding a question between co-defendants."⁶ "When the right claimed by a defendant consists simply in excluding the plaintiff from the right asserted by the latter, of course there is no occasion for a cross-bill. Therefore, when a bill is filed by a mortgagor against a mortgagee for redemption, if the defendant can show that the plaintiff is not entitled to redeem, he can obtain the benefit of a foreclosure without filing a cross-bill for the purpose; for the dismissal of a bill to redeem upon its merits is itself a foreclosure."⁷ It has been said that where an original bill seeks to enforce an equitable title against several defendants, it is improper for a defendant to file a cross-bill seeking the enforce-

Toulmin v. Reid, 14 Beav. 499; *Jervis v. Berridge*, L. R. 8 Ch. 357; *Campbell v. Campbell*, 4 Halst. Eq. (N. J.) 740; *Little v. Merrill*, 62 Me. 328.

² *Fife v. Clayton*, 13 Ves. 546; *Stapylton v. Scott*, 13 Ves. 425; *Bradford v. Union Bank of Tennessee*, 13 How. 57; *Northern Railroad v. Ogdensburg & Lake Champlain R. R. Co.*, 18 Fed. R. 815. But see s. c. 20 Fed. R. 347.

³ *Langdell's Eq. Pl.* § 122; *Clarke v. Tipping*, 4 Beav. 588; *Toulmin v. Reid*,

14 Beav. 505; *Kennington v. Houghton*, 2 Y. & C. N. R. 630.

⁴ *La Touche v. Lord Dunsany*, 1 Schoales & Lefroy, 137, 166, 167; s. c. as *Chamley v. Lord Dunsany*, 2 Schoales & Lefroy, 690, 718; *Langdell's Eq. Pl.* § 125.

⁵ *Hood v. Clapham*, 19 Beav. 90. See *Elliott v. Pell*, 1 Paige (N. Y.), 263.

⁶ *Langdell's Eq. Pl.* § 125.

⁷ *Langdell's Eq. Pl.* § 123. See *Hilton v. Barrow*, 1 Ves. Jr. 284.

ment of a title paramount against his co-defendants.⁸ It was held, where a bill was filed by one tenant in common of a mortgage against the two others, who had bought in separate parcels the mortgaged property, the complainant seeking to recover from them his share of the purchase-money, that a cross-bill could not be filed by one defendant against the other to recover a balance due him "resulting from the price severally paid and to be paid by them, as compared with the respective amounts" of their interests in the mortgage.⁹ Where a bill was filed to restrain a sale under an execution, the defendant was allowed to file a cross-bill praying a decree, declaring that he had a lien upon the property on which he had levied, appointing a receiver, and directing the sale of such property.¹⁰ Where the mortgagee filed a bill to collect rents from a lessee and a sub-lessee of the mortgaged railroad, and for a declaration that the lease was binding upon the sub-lessee, a cross-bill by the lessee against the mortgagor, who was a defendant to the original, seeking a cancellation of the lease, was held properly filed.¹¹ Where the original bill prayed for an injunction against the infringement of a patent relating to electric signals granted William R. Sykes, leave to file a cross-bill praying an injunction against the use by complainant of the term "The Sykes System" was denied.¹² In a suit to enjoin the alleged infringement of a patent, a cross-bill seeking an injunction against the publication of circulars by plaintiff to defendant's customers, threatening them with suits and penalties if they use defendant's wares, which are charged to be infringements of plaintiff's patent, has been held improper.¹³ Where a bill was filed against the stockholders of an insolvent corporation to collect out of their unpaid subscriptions the amount of a judgment against it, a cross-bill filed by one who had paid a larger proportion of his subscription than the rest, praying for an accounting, and that the others be compelled to pay the judgment, was held bad upon demurrer.¹⁴ Where a bill was filed by a remainder-

⁸ *Ayres v. Carver*, 17 How. 591, 593.

⁹ *Weaver v. Alter*, 3 Woods, 152.

¹⁰ *Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank of Chicago*, 134 U. S. 276.

¹¹ *Jesup v. Illinois Cent. R. Co.*, 43 Fed. R. 483.

¹² *Johnson R. R. Signal Co. v. Union Switch & Signal Co.*, 43 Fed. R. 331.

¹³ *International Tooth-Crown Co. v. Carmichael*, 44 Fed. R. 350. See *Fougeres v. Murbarger*, 44 Fed. 292, cited *supra*, § 74. *Contra*, *Ide v. Ball Engine Co.*, 31 Fed. R. 901.

¹⁴ *Putnam v. New Albany*, 4 Biss. 365, 373.

man under a will, claiming that certain provisions of the will establishing prior estates to his own were invalid, and praying that the trustees appointed by the will convey the property devised, either to him, or to the heirs-at-law, or to the State, a bill filed by the heirs-at-law, not impugning the estate of the equitable tenant for life, but praying that the estates in remainder, some of which were to persons yet unborn, should be declared invalid, was held improper as a cross-bill.¹⁵ A cross-bill should not be filed merely to procure the appointment of a receiver.¹⁶ Where, on a bill by several persons to restrain the infringement of a patent and for an account, the defenses being invalidity of the patent and a license, the court sustains the patent and decrees damages; a bill cannot be sustained as a cross-bill, which sets up a judgment in another suit against one of the complainants, and prays that they all set forth and discover what share of the damages is claimed by each, so that the defendant who files the cross-bill may set off his judgment against the share claimed by his judgment debtor.¹⁷ A cross-bill in a suit to restrain the infringement of a patent will not be sustained when filed by a defendant who claims no title to the patented invention, for the sole purpose of a discovery of the weakness of the complainant's title, an injunction against his suing to enforce his patent, and a decree declaring the patent void.¹⁸ It has been held that, in such a suit, a third party who has been allowed to intervene cannot file a cross-bill which could not have been maintained by the original defendant.¹⁹ It has been held that in a suit brought under U. S. R. S. § 4918, touching interfering patents, affirmative relief may be given the defendant upon his answer; and that a cross-bill is unnecessary,²⁰ but may be filed if the defendant so chooses.²¹ An answer in such a suit cannot be treated as a bill to enjoin an infringement.²² Cross-bills were formerly used to bring to the

¹⁵ *Cross v. DeValle*, 1 Wall. 5. See *Neal v. Foster*, 34 Fed. R. 496, 498; *Osborne v. Barge*, 30 Fed. R. 805.

¹⁶ *Indiana Southern R. R. Co. v. Liverpool, London & Globe Ins. Co.*, 109 U. S. 168.

¹⁷ *Rubber Company v. Goodyear*, 9 Wall 807.

¹⁸ *Young v. Colt*, 2 Blatchf. 373.

¹⁹ *Curran v. St. Charles Car Co.*, 32 Fed. R. 835. But see *Ide v. Ball Engine Co.*, 31 Fed. R. 991.

²⁰ *Lockwood v. Cleveland*, 6 Fed. R. 721; *Foster v. Lindsay*, 3 Dill. 127; *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. R. 602.

²¹ *American Clay Bird Co. v. Ligowski Clay-Pigeon Co.*, 31 Fed. R. 466; *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. R. 602, 607. *Contra*, *Lockwood v. Cleveland*, 6 Fed. R. 721, 727.

²² *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. R. 602, 609.

attention of the court facts constituting a defense, which had occurred since the answer was filed, thus answering the purpose of a plea *puis darrein continuance* at law.²³ Now, however, it is more customary to plead such matters in a supplemental answer.²⁴ Matters which regularly should be included in a cross-bill may by consent be set up in an answer, and relief granted as if a cross-bill had been filed;²⁵ and by consent a cross-bill may be filed when an answer is all that is required to protect the rights of the defendant.²⁶ When matter which should regularly have been set up by a cross-bill or supplemental answer has been pleaded in a petition, it is too late to object to the regularity of the procedure after answer and decree.²⁷

§ 172. **Frame of a Cross-Bill.** — A cross-bill should state the previous proceedings in the suit, setting forth specifically the parties, the objects, and the prayer of the original bill; and the rights of the party exhibiting the cross-bill, which are necessary to be made the subject of a cross litigation, or the ground on which he resists the claims of the plaintiff in the original bill, whichever is the object of the cross-bill.¹ It should not introduce new and distinct matters not embraced in or germane to the original suit. For as to such matters it would be an original bill; and they could not properly be examined at the hearing upon the former bill.² It should not contain any statements inconsistent with those in the answer of the defendant filing it. If so, they may be disregarded;³ or if principally composed of such, the cross-bill may be dismissed.⁴ It would be sustained even if the requisite difference of citizenship do not exist between the plaintiffs and defendants in it, as it is merely auxiliary to the principal suit of which the court has already obtained jurisdic-

²³ Mitford's Pl. ch. 1, § 3; Hayne v. Coburn v. Cedar Valley Land & Cattle Hayne, 3 Ch. R. 19. See Kelsey v. Co., 138 U. S. 196, 222.

Hobby, 16 Pet. 269, 277.

²⁴ See Suydam v. Truesdale, 6 McLean, 459; Kelsey v. Hobby, 16 Pet. 269, 277; Talmage v. Pell, 9 Paige (N. Y.), 410, 413; Electrical Accumulator Co. v. Brush Electric Co., 44 Fed. R. 602, 607.

²⁵ Heath v. Erie Ry. Co., 9 Blatchf. 316. See Kelsey v. Hobby, 16 Pet. 269.

²⁶ Northern Railroad v. Ogdensburg & Lake Champlain R. R. Co., 18 Fed. R. 815; s. c. 20 Fed. R. 347.

²⁷ Kelsey v. Hobby, 16 Pet. 269, 277; 117.

§ 172. ¹ Story's Eq. Pl. § 401; Mitford's Pl. ch. 1, § 3. But See Neal v. Foster, 34 Fed. R. 496.

² Story's Eq. Pl. § 401; Weaver v. Alter, 3 Woods, 152; Cross v. DeValle, 1 Wall. 5; Ayres v. Carver, 17 How. 591; Rubber Company v. Goodyear, 9 Wall. 807.

³ Savage v. Carter, 9 Dana (Ky.), 409, 414.

⁴ Hudson v. Hudson, 3 Randolph (Va.),

tion.⁵ Where a stranger by leave of the state court intervened and then removed the case, and after removal the complainant amended his bill so as to omit all allegations affecting the intervenor, and then moved to remand; the fact that the intervenor had filed a cross-bill against the original parties to the suit was held no bar to the remand.⁶ It seems that a cross-bill may in some cases pray relief which could not be obtained by original bill because of a remedy at law. Thus, it has been held that a defendant who is not in possession of land, when a bill is filed against him to remove a cloud to the title to the same, may, if he can show a better title than that of the complainant, obtain possession of the land by cross-bill.⁷ A cross-bill filed simply for discovery need show no equity for discovery, as the court's jurisdiction for that purpose is sufficiently supplied by the original bill.⁸ When a cross-bill is brought by one defendant against another, it seems that the original complainant must be made a party to it.⁹ It has been said by a judge of great authority that "new parties cannot be introduced into a cause by a cross-bill."¹⁰ It was then held that this could not be done when the result would be to arrange parties of the same citizenship upon different sides of a controversy over which a Federal court would have no original jurisdiction.¹¹ It has been said, however, that such an objection can be raised only by the new parties thus sought to be brought in.¹² And in a suit to restrain the infringement of a patent, a cross-bill was sustained which brought in as defendant to it a new party, the assignor of the patent to the original complainant; claimed that that assignor had previously assigned the equitable title thereto to the orator of the cross-bill, and that the legal assignee had bought with notice thereof; and prayed a conveyance of the patent and an injunction against further annoyance.¹³ A

⁵ *Peay v. Schenck & Bliss*, Woolw. 175; *Cross v. DeValle*, 1 Wall. 5; *Osborne Co. v. Barge*, 30 Fed. R. 805; *Jesup v. Illinois Cent. R. Co.*, 43 Fed. R. 483; *Morgan's La. & T. R. R., S.S. Co. v. Texas Central Ry. Co.*, 137 U. S. 171. But see *Veach v. Rice*, 131 U. S. 293, 318.

⁶ *Iowa Homestead Co. v. Des Moines Nav. & R. R. Co.*, 8 Fed. R. 97.

⁷ *Greenwalt v. Duncan*, 16 Fed. R. 35. *Contra*, *Calverley v. Williams*, 1 Ves. Jr. 211, 213; *Story's Eq. Pl.* § 398.

⁸ *Story's Eq. Pl.* § 399; *Mitford's Pl.*

ch. 1, § 3; *Doble v. Potman*, Hardres, 160.

⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 1747; *Putnam v. New Albany*, 4 Biss. 365, 373.

¹⁰ Mr. Justice Curtis in *Shields v. Barrow*, 17 How. 130, 145. See *Randolph v. Robinson*, 2 N. J. L. J. 171.

¹¹ *Shields v. Barrow*, 17 How. 130.

¹² *Brandon Manuf. Co. v. Prime*, 14 Blatchf. 371, 373.

¹³ *Brandon Manuf. Co. v. Prime*, 14 Blatchf. 371. See also *Blodgett v. Ho-*

stranger to a suit cannot file a cross-bill without permission from the court.¹⁴ A cross-bill filed by a stranger without such permission may be stricken from the file.¹⁵ It is the better practice for a defendant to apply for leave before filing a cross-bill.¹⁶ In England a cross-bill could be filed in a different court from that where the original bill was pending;¹⁷ but a cross-bill cannot be filed in a State court to a bill pending in a Circuit Court of the United States.¹⁸ It is no objection to a cross-bill in a Federal court that an original bill for the same relief was previously filed in a court of the State where the Federal court was held;¹⁹ but after a removal of the suit begun in the State court, the two suits may be consolidated.²⁰ A cross-bill should be signed by counsel.²¹ In other respects cross-bills should conform to the requirements of original bills.²² It is irregular to unite a cross-bill and an answer in the same pleading.²³ A petition "by way of a cross-bill" filed by a defendant, "referring to the case by title, and stating that 'the facts fully appear in the case,' praying the reverse of what the complainant had prayed, but not making anybody defendant nor praying process, and under which no process was obtained," was held a mere nullity, which should have been stricken from the file, and was disregarded by the court upon appeal.²⁴ It seems that a bill filed as a cross-bill, if irregular in that respect alone, may yet be sustained as an original bill.²⁵ A bill intended as a bill of review, but defective in that respect, may be sustained as a cross-bill.²⁶

§ 173. **Proceedings upon Cross-Bills.** — It has been held at cir-

bart, 18 Vt. 414; *Hurd v. Case*, 32 Ill. 45; *Jones v. Smith*, 14 Ill. 229.

¹⁴ *Bronson v. La Crosse & Milwaukee R. R. Co.*, 2 Wall. 283; *Forbes v. Memphis, El Paso & Pacific R. R. Co.*, 2 Woods, 323.

¹⁵ *Bronson v. La Crosse & Milwaukee R. R. Co.*, 2 Wall. 283, 294, 303; *Putnam v. New Albany*, 4 Biss. 365, 367.

¹⁶ See *International Tooth-Crown Co. v. Carmichael*, 44 Fed. R. 350.

¹⁷ *Parker v. Leigh*, 6 Madd. 115; *Story's Eq. Pl.* § 400.

¹⁸ *Story's Eq. Pl.* § 400.

¹⁹ *Brandon Manuf. Co. v. Prime*, 14 Blatchf. 371.

²⁰ *Wabash, St. L., & P. Ry. Co. v. Central Trust Co. of N. Y.*, 23 Fed. R. 513.

²¹ *Smith's Ch. Pr. Book II. ch. i.*

²² *Smith's Ch. Pr. Book II. ch. i.*; *Daniell's Ch. Pr.* (5th Am. ed.) ch. xxxiv. § 1. See *Mason v. Gardiner*, 4 Brown Ch. C. 436; *Greenwalt v. Duncan*, 16 Fed. R. 35.

²³ *Hubbard v. Turner*, 2 McLean, 519, 540; *Morgan v. Tipton*, 3 McLean, 339, 344. But see *Talbot v. McGee*, 4 Monr. (Ky.) 375, 378.

²⁴ *Washington R. R. v. Bradleys*, 10 Wall. 299, 300, 303.

²⁵ *Foss v. First Nat. Bank*, 1 McCrary, 474.

²⁶ *Houghton v. West*, 2 Brown Parl. Rep., by Tomlins, 88; *Story's Eq. Pl.* § 401a.

cuit that a subpoena to answer a cross-bill may, by express leave of the court, be served by substitution upon the attorney for the complainant to the original bill when his client is beyond the jurisdiction of the court.¹ In that case the original bill was filed to foreclose a mortgage, of which the cross-bill prayed a cancellation. The court said: "The reason of this rule would seem to limit it in equity cases to cross-bills, either wholly or partly defensive in their character, and to deny its application to cross-bills setting up facts not alleged in the original bill, and which new facts, though they relate, as they must, to the subject-matter of the original bill, are made the basis for the affirmative relief."² Leave to make substituted service was refused in a case where the plaintiffs offered to stipulate that the matter sought to be pleaded by cross-bill might be set up by answer.³ Service by publication of a subpoena upon a cross-bill is improper.⁴ "Where a defendant in equity files a cross-bill for discovery only against the plaintiff to the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used."⁵ By amending his bill, the plaintiff was held in England to lose the benefit of a similar rule,⁶ provided that, when he made the amendment, he knew that the cross-bill had been filed.⁷ The testimony taken under the cross-bill may be read for or against the original bill; and the testimony taken under the original bill can be read for or against the cross-bill. In either case a formal order granting leave to do this, "saving all just exceptions," should first be obtained *ex parte*.⁸ Both bills are usually heard together both in the first instance⁹ and upon ap-

§ 173. ¹ Lowenstein v. Glidewell, 5 Dill. 325; Kingsbury v. Buckner, 134 U. S. 650, 676; Peay v. Schenck & Bliss, Woolw. 175; Johnson R. R. Signal Co. v. Union Switch & Signal Co., 43 Fed. R. 331. But see Rubber Co. v. Goodyear, 9 Wall. 807, 810, 811; § 96 and citations.

² Caldwell, J., in Lowenstein v. Glidewell, 5 Dill. 325, 328. See Rubber Co. v. Goodyear, 9 Wall. 807, 810, 811; and *supra*, § 96.

³ Heath v. Erie Ry. Co., 9 Blatchf. 316.

⁴ Webster Loom Co. v. Short, 10 Off. Gaz. 1019.

⁵ Rule 72.

⁶ Noel v. King, 2 Madd. 392; Hannah v. Hodgson, 30 Beav. 19.

⁷ Gray v. Haig, 13 Beav. 65.

⁸ Daniell's Ch. Pr. (5th Am. ed.) 1552, 1553; Lubiere v. Genou, 2 Ves. Sen. 579.

⁹ Ayres v. Carver, 17 How. 591; Moore v. Huntington, 17 Wall. 417, 422; *Ex parte* Railroad Co., 95 U. S. 221; Daniell's Ch. Pr. (2d Am. ed.) 1751.

peal.¹⁰ Where a decree had been made dismissing a cross-bill before a decree upon the original bill, it was held that an appeal therefrom taken before a decree upon the original bill must be dismissed.¹¹ A decree upon the original bill will supersede a previous decree upon a cross-bill if the two are inconsistent.¹² Where the cross-bill seeks relief, the voluntary dismissal of the original bill will not dismiss the cross-bill.¹³ It is otherwise where the cross-bill merely seeks discovery.¹⁴ It has been held that a dismissal of the original bill by the court after a hearing operates as a dismissal of a cross-bill between the defendants, even though the cross-bill show a good case for relief; "but as a cross-bill, it must follow the fate of the original bill."¹⁵ A cross-bill should not be filed before the answer to the original bill.¹⁶ It should regularly be filed with, or immediately after, the defendant's answer,¹⁷ but may be allowed any time before the final decree.¹⁸ But a creditor who has come in under a decree for the benefit of creditors may file a cross-bill without leave of the court, if his rights cannot be otherwise adequately protected.¹⁹ In a case where the defendant, after answer, learned of facts tending to show that the plaintiff had before suit parted with all interest in the subject-matter to a citizen of the same State as the defendant, the proceedings were stayed until the complainant answered a cross-bill charging such a transfer.²⁰ When an abatement takes place after a cross-bill has been filed, it seems that there should be a bill of revivor filed in both the original and the cross cause.²¹ Otherwise, proceedings upon cross-bills are substantially the same as those upon original bills.²²

¹⁰ *Ayres v. Carver*, 17 How. 591; *Ex parte Railroad Co.*, 95 U. S. 221.

¹¹ *Ayres v. Carver*, 17 How. 591.

¹² *Ex parte Railroad Co.*, 95 U. S. 221, 225.

¹³ *Lowenstein v. Glidewell*, 5 Dill. 325; *Chicago & Alton R. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702.

¹⁴ *Donohoe v. Mariposa Land & Mining Co.*, 1 Pacific Coast L. J. 211, 219.

¹⁵ Mr. Justice Field in *Dows v. Chicago*, 11 Wall. 108, 112. See also *Cross v. DeValle*, 1 Wall. 5, 14. But see *Wabash, St. L. & P. Ry. Co. v. Central Trust Co. of N. Y.*, 22 Fed. R. 138, 142; *Donohoe v. Mariposa Land & Mining Co.*, 1 Pacific

Coast L. J. 211; *Jesup v. Illinois Cent. R. Co.*, 43 Fed. R. 483.

¹⁶ *Allen v. Allen*, Hempst. 58.

¹⁷ *Daniell's Ch. Pr.* (2d Am. ed.) 1745; *White v. Buloid*, 2 Paige (N. Y.), 164; *Allen v. Allen*, Hempst. 58.

¹⁸ *Neal v. Foster*, 34 Fed. R. 496; *Rogers v. Reissner*, 31 Fed. R. 592.

¹⁹ *La Touche v. Lord Dunsany*, 1 Sch. & Lef. 137; *Story's Eq. Pl.* § 397.

²⁰ *Young v. Pott*, 4 Wash. 521.

²¹ *Story's Eq. Pl.* § 363.

²² See, however, *Lautz v. Gordon*, 28 Fed. R. 264; *Puetz v. Bransford*, 31 Fed. R. 458.

CHAPTER XIV.

BILLS OF REVIVOR, SUPPLEMENTAL BILLS, BILLS OF REVIVOR AND SUPPLEMENT, AND BILLS IN THE NATURE OF THE SAME.

§ 174. **Abatement.** — If any event happens after the filing of a bill in equity which makes it necessary to bring in a new party, either plaintiff or defendant, in order to obtain a complete or satisfactory determination of the controversy, the suit will either abate or become defective.¹ The abatement or defect must be remedied by the filing of a bill of revivor, a bill in the nature of a bill of a revivor, a supplemental bill, a bill in the nature of a supplemental bill, or a bill of revivor and supplement.² An abatement takes place by the death of one of the parties, or, where a married woman is under a disability, by the marriage of a female plaintiff.³ An action entirely abates by the death of any of the plaintiffs:⁴ unless his interest therein wholly ceases by his death,⁵ or survives to another party to the suit,⁶ or he has been previously discharged by a decree in an interpleader⁷ suit, or a suit in the nature of an interpleader; when it does not. Formerly a suit abated by the marriage of a female plaintiff;⁸ but it may be doubted whether this rule would be followed where a married woman has the same power over her property as if she were single.⁹ By the marriage of a female defendant, a suit never abated, though her husband had to be named in all subsequent proceedings.¹⁰ When the husband of a female plaintiff died, by the former practice she could at her option continue the suit without filing any bill of revivor; but if she did not, it was considered abated and she was not liable for the costs.¹¹ A suit abates upon the death of a defendant who has appeared so far as

§ 174. ¹ Mitford's Pl. ch. 1, § 3.

² Mitford's Pl. ch. 1, § 3. See *infra*, § 373, for proceedings at common law.

³ Mitford's Pl. ch. 1, § 3.

⁴ Mitford's Pl. ch. 1, § 3; Story's Eq. Pl. § 354.

⁵ Daniel's Ch. Pr. (2d Am. ed.) 1698; Mitford's Pl. ch. 1, § 3.

⁶ Fallows v. Williamson, 11 Ves. 309; Boddy v. Kent, 1 Mer. 364; Fisher v. Rutherford, Baldw. 188; Daniel's Ch. Pr. (2d Am. ed.) 1699.

⁷ Anon., 1 Vern. 351; Jennings v. Nugent, 1 Molloy, 134; Daniel's Ch. Pr. (2d Am. ed.) 1765.

⁸ Mitford's Pl. ch. 1, § 3; Story's Eq. Pl. § 354.

⁹ Lorillard v. Standard Oil Company, 2 Fed. R. 902.

¹⁰ Mitford's Pl. ch. 1 § 3; Story's Eq. Pl. § 354.

¹¹ Mitford's Pl. ch. 1, § 3.

proceedings against him or his interest are concerned, and if he were an indispensable party to a decree all proceedings must be suspended till his representatives have been brought in.¹² If, however, his interest wholly ceases by his death, or wholly survives to one of the other parties, no revivor will be necessary.¹³ A suit abates by the death of a member of a firm during a suit against it.¹⁴ The death of a defendant before appearance does not abate the suit. For, according to the former practice, till his appearance, or a decree taken against him *pro confesso*, there was no cause against him: but a bill had to be filed against his representative, which was an original bill as far as respected the defendant, but a supplemental bill with respect to the suit.¹⁵ It has been held that the death of a sole defendant to a suit for an injunction against the infringement of a patent and for an accounting, when it occurs before a decree for an account, abates and terminates so much of the suit as seeks an injunction, so that it cannot be revived against his executor, unless it be shown that the latter continues the infringement;¹⁶ but that the suit may be continued against his personal representative for an accounting of profits and for damages.¹⁷ After an interlocutory decree for an accounting, such a suit may be revived against the personal representatives of the deceased defendant.¹⁸ Unless there be some clause in its charter to the contrary a suit by or against a corporation ordinarily abates by the dissolution of the corporation;¹⁹ but it has been held that the entrance into liquidation and the closing of the business of a national banking association does not abate a suit brought in its name.²⁰ After a decree has been reversed upon appeal, and the cause sent back with a special mandate directing the further proceedings to be taken, or affirmed upon appeal and sent back with a mandate directing its enforcement, it is too late to claim for the first time that the suit has abated

¹² Story's Eq. Pl. § 369.

¹³ Mitford's Pl. ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1698, 1699; Story's Eq. Pl. § 357.

¹⁴ Wilson v. Seligman, 10 Repr. 651, A. D. 1880.

¹⁵ Shadwell, V. C., in Crowfoot v. Mander, 9 Simons, 396. See United States v. Fields, 4 Blatchf. 326.

¹⁶ Draper v. Hudson, 1 Holmes, 208; Walker on Patents, § 700.

¹⁷ Kirk v. Du Bois, 28 Fed. R. 460; Hohorst v. Howard, 37 Fed. R. 97; Lake Superior Iron Co. v. Brown, Bonnell &

Co., 44 Fed. R. 539. But see Draper v. Hudson, 1 Holmes, 208.

¹⁸ Atterbury v. Gill, 13 Off. Gaz. 276.

¹⁹ Nat. Bank v. Colby, 21 Wall 609; Greeley v. Smith, 3 Story, 658; Mumma v. Potomac Co., 8 Pet. 281. But see Lake Superior Iron Co. v. Brown, Bonnell & Co., 44 Fed. R. 539; as to municipal corporations, Hemingway v. Stansell, 106 U. S. 399; Grantland v. Memphis, 12 Fed. R. 287; as to the effect of a consolidation of two corporations, Edison Electric Light Co. v. Westinghouse, 34 Fed. R. 242.

²⁰ Nat. Bank v. Ins. Co., 104 U. S. 64, 72.

by the death of the complainant before the entry of the decree from which the appeal was taken.²¹

§ 175. **Effect of Abatement.** — “An abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed and ended. But in the sense of courts of equity, an abatement signifies only a present suspension of all proceedings in the suit, from the want of proper parties capable of proceeding therein. At the common law, a suit, when abated, is absolutely dead. But in equity, a suit, when abated, is (if such an expression be allowable) merely in a state of suspended animation, and it may be revived.”¹ Upon the total abatement of a suit the cause is completely suspended while the abatement continues; and, in general, all orders made pending such abatement will be considered nugatory and may be discharged.² Applications may, however, be made by parties affected thereby, to discharge process of contempt issued or executed pending the abatement.³ Applications have, moreover, been granted during an abatement for the payment of money out of court, when the right thereto had been previously established;⁴ for the preservation of the property in dispute;⁵ for the punishment of a party for breach of an injunction;⁶ and to set aside irregular proceedings pending the abatement.⁷ So, too, a decree previously made could be enrolled;⁸ and it has been held in England that depositions might be taken under a commission previously issued.⁹ Orders previously made continue in force until discharged.¹⁰ But the time given a party within which to do a certain act is always suspended by an abatement.¹¹ Where a preliminary injunction has been previously granted, the court may issue an order requiring that the representatives of a deceased plaintiff revive within a certain time, usually a fortnight after notice, or that the injunction be dissolved.¹² No such order will be granted after a

²¹ *Ex parte Sory*, 12 Pet. 339, 342; *Lake Superior Iron Co. v. Brown, Bonnell & Co.*, 44 Fed. R. 539.

§ 175. ¹ Story's Eq. Pl. § 354. See also *Hoxie v. Carr*, 1 Sumner, 173, 178; *Mellus v. Thompson*, 1 Cliff. 125, 129.

² *Daniell's Ch. Pr.* (2d Am. ed.) 1714; *Griswold v. Hill*, 1 Paine, 483.

³ *Daniell's Ch. Pr.* (2d Am. ed.) 1715.

⁴ *Finch v. Lord Winchelsea*, 1 Eq. Cas. Abr. 2; *Roundell v. Curren*, 6 Ves. 250; *Daniell's Ch. Pr.* (2d Am. ed.) 1715.

⁵ *Washington Insurance Co. v. Slee*, 2 Paige (N. Y.), 365, 368.

⁶ *Hawley v. Bennett*, 4 Paige (N. Y.), 163.

⁷ *Quackenbush v. Leonard*, 10 Paige (N. Y.), 131.

⁸ *Daniell's Ch. Pr.* (2d Am. ed.) 1715.

⁹ *Thompson v. Took*, 1 Dickens, 115; *Peters v. Robinson*, 1 Dickens, 116; *Sinclair v. James*, 1 Dickens, 277.

¹⁰ *Daniell's Ch. Pr.* (2d Am. ed.) 1716; *Lee v. Lee*, 1 Hare, 622; *Hawley v. Bennett*, 4 Paige (N. Y.), 163.

¹¹ *Gregson v. Oswald*, 1 Cox Eq. 343.

¹² *Jones v. Massey*, *Brown v. Warner*, *Turner v. Cole*, all quoted in *Chowick v.*

decree for a perpetual injunction; for that "would be in effect decreeing a perpetual suit."¹³ The power of the court to make an order that the representatives of a deceased plaintiff revive within a certain limited time after notice to them, or that the bill be dismissed, is doubtful.¹⁴ Where the abatement is partial, as where it is caused by the death of a defendant, it prevents those proceedings only by which his interest may be affected.¹⁵ Thus, if there be a decree against trustees and the beneficiary of their trust for a conveyance, and the beneficiary die, the trustees may still be obliged to convey;¹⁶ and, after the death of one defendant, process of contempt may be issued and executed against the others.¹⁷ It has also been held that the death of a defendant after hearing but before a decree does not necessarily prevent judgment;¹⁸ and that, if practicable, a decree made before a defendant's death, for example, a decree for a sale, may be enforced without revivor.¹⁹

§ 176. **When a Suit may be Revived and Effect of Revivor.** — A suit which has abated may generally be revived when anything further remains to be done therein.¹ But a suit will not be allowed to be revived merely for costs which are untaxed, and have not been previously directed to be paid out of a particular estate or fund, or decreed against an executor out of assets.² Nor can a bill of revivor be brought upon a bill filed merely for discovery, after the discovery required thereby has been obtained.³ A suit cannot be revived seven years after its dismissal for a defect of parties caused by a failure to revive.⁴ Where the abatement is by the death or marriage of a plaintiff, an order to revive the suit places it and all proceedings in it in precisely "the same plight, state, and condition that the

Dimes, 3 Beav. 290, 292, 293; *Chester v. Life Assoc. of America*, 4 Fed. R. 487.

¹³ *Askew v. Townsend*, 2 Dickens, 471.

¹⁴ Compare dictum of Judge Story in *Hoxie v. Carr*, 1 Sumner, 173, 178, and the case of *Chowick v. Dimes*, 3 Beav. 290, where Lord Langdale, M. R., granted such an order; with that of *Lee v. Lee*, 1 Hare, 617, where Vice-Chancellor Wigram held that the court had no power to make one.

¹⁵ *Daniell's Ch. Pr.* (2d Am. ed.) 1716; *Finch v. Lord Winchelsea*, 1 Eq. Cas. Abr. 2.

¹⁶ *Finch v. Lord Winchelsea*, 1 Eq. Cas. Abr. 2; *Daniell's Ch. Pr.* (2d Am. ed.) 1716.

¹⁷ *Daniell's Ch. Pr.* (2d Am. ed.) 1716.

¹⁸ *Davies v. Davies*, 9 Ves. 461; *Daniell's Ch. Pr.* (2d Am. ed.) 1717.

¹⁹ *Whiting v. Bank of the United States*, 13 Pet. 6.

§ 176. ¹ *Gilbert's Forum Romanum*, 181; *Johnson v. Peck*, 2 Ves. Sen. 465; *Fitzpatrick v. Domingo*, 14 Fed. R. 216; *Daniell's Ch. Pr.* (2d Am. ed.) 1694.

² *Daniell's Ch. Pr.* (2d Am. ed.) 1694-1697; *Story Eq. Pl.* § 371; *Blower v. Morrets*, 3 Atk. 772; *Kemp v. Mackrell*, 3 Atk. 812; *Travis v. Waters*, 1 J. Ch. (N. Y.) 85.

³ *Horsburg v. Baker*, 1 Pet. 232.

⁴ *Houth v. Owens*, 30 Fed. R. 910.

same were in at the time when the abatement took place.”⁵ The new plaintiff may then take the same proceedings that the original plaintiff might have done.⁵ Thus, the new plaintiff may prosecute process of contempt against the defendant, taking it up where it stood at the abatement; and if a process has been previously issued it will be revived with the revivor of the suit.⁶ But where the abatement is caused by the death of a defendant, “the process, being personal, cannot be revived.”⁷ In general, however, an order to revive against the representatives of a deceased defendant, will place the suit as fully in the same position with regard to such representatives as can be done with reference to the change of the individuals before the court.⁸ After revivor testimony previously taken can be used.⁹

§ 177. **Who may Revive a Suit.** — It is generally necessary in order to entitle one to revive, that there should be a privity between him and the party whose death caused the abatement. Therefore, upon the death of one suing in a representative capacity, the defect can usually be remedied only by a supplemental bill, and not by a bill of revivor.¹ It has been held, however, that upon the death of an administrator, the administrator *de bonis non* may file a bill of revivor, “though there is no actual privity between him and the original plaintiff.”² But Judge Story suggests that a bill in the nature of a bill of revivor would be more appropriate.³ It is said by Lord Redesdale that in the case of a bill by creditors on behalf of themselves and other creditors, any creditor may revive;⁴ but according to Daniell, in practice the form of a bill in such a case is that of a supplemental bill in the nature of a bill of revivor, and not of a mere bill of revivor.⁵ Before decree, a suit can only be revived by one or all of the surviving plaintiffs, or the representatives of one that has died.⁶ If any of these refuse to join, he must be made a defendant to the bill filed to revive the suit.⁷ If the suit concerned solely the

⁵ Gregson v. Oswald, 1 Cox Eq. 344.

⁶ Vattier v. Hinde, 7 Pet. 252, 266; Philips v. Derby, 1 Dickens, 98; Hyde v. Forster, 1 Dickens, 132; Daniell's Ch. Pr. (2d Am. ed.) 1778.

⁷ Hyde v. Forster, 1 Dickens, 132; Daniell's Ch. Pr. (2d Am. ed.) 1778.

⁸ Daniell's Ch. Pr. (2d Am. ed.) 1778.

⁹ Daniell's Ch. Pr. (2d Am. ed.) 1778.

¹⁰ Vattier v. Hinde, 7 Pet. 252, 266.

§ 197. ¹ Daniell's Ch. Pr. (2d Am. ed.) 1697; Story's Eq. Pl. § 340.

² Daniell's Ch. Pr. (2d Am. ed.) 1697; Mitford's Pl. ch. 1, § 3; Huggins v. York Building Co., 2 Eq. Cas. Abr. 3; Owen v. Curzon, 2 Vern. 237.

³ Story's Eq. Pl. § 382, note 4.

⁴ Mitford Pl. ch. 1, § 3.

⁵ Daniell's Ch. Pr. (2d Am. ed.) 1703.

⁶ Daniell's Ch. Pr. (2d Am. ed.) 1700; Chester v. Life Association of America, 4 Fed. R. 487.

⁷ Daniell's Ch. Pr. (2d Am. ed.) 1700; Fallows v. Williamson, 11 Ves. 309.

real estate of a deceased plaintiff, his heirs alone are entitled to represent him therein;⁸ if solely his personal estate, his executor or administrator;⁹ if both, separate bills may be revived by both his heirs and personal representatives, and the neglect of one to revive will not prejudice the other.¹⁰ In the case of a suit by a corporation sole, the death of the plaintiff, if he were entitled to the subject-matter for his own benefit, caused an abatement; and the suit could be revived by his personal representative.¹¹ If, however, he were only entitled to the subject-matter in his corporate capacity, the suit became defective, and could only be continued by his successor by means of an original bill in the nature of a supplemental bill.¹² After a decree, a suit may be revived by any defendant, or by the representative of any deceased defendant, who has acquired any right thereunder, as well as by any plaintiff.¹³

§ 178. **Manner of Revivor in General.** — “When a suit became abated after a decree signed and inrolled, it was anciently the practice to revive the decree by a subpœna in the nature of a *scire facias*, upon the return of which the party to whom it was directed might show cause against the reviving of the decree, by insisting that he was not bound by the decree, or that for some other reason it ought not to be enforced against him, or that the person suing the subpœna was not entitled to the benefit of the decree. If the opinion of the court was in his favor he was dismissed with costs. If it was against him, or if he did not oppose the reviving of the decree, interrogatories were exhibited for his examination touching any matter necessary to the proceedings. If he opposed the reviving of the decree on the ground of facts which were disputed, he was also to be examined upon interrogatories, to which he might answer or plead; and issue being joined, and witnesses examined, the matter was finally heard and determined by the court. But if there had been any proceeding subsequent to the decree, this process was ineffectual, as it

⁸ Mitford's Equity Pleading, ch. 1, § 3; Ferrers v. Cherry, 1 Equity Cases Abridged, 3, 4; Mellus v. Thompson, 1 Cliff. 125.

⁹ Mitford's Pl. ch. 1, § 3; Mellus v. Thompson, 1 Cliff. 125; Ferrers v. Cherry, 1 Eq. Cas. Abr. 3, 4.

¹⁰ Mitford's Pl. ch. 1, § 3; Story's Eq. Pl. § 367; Mellus v. Thomson, 1 Cliff.

125; Ferrers v. Cherry, 1 Eq. Cas. Abr. 3, 4.

¹¹ Daniell's Ch. Pr. (2d Am. ed) 28, 1701; 1 Kyd on Corporations, 77.

¹² Daniell's Ch. Pr. (2d Am. ed.) 28 & 1701; 2 Bac. Abr. Corporation, E. 2.

¹³ Williams v. Cooke, 10 Ves. 406; Devaynes v. Morris, 1 Myl. & Cr. 213, 225.

revived the decree only, and the subsequent proceedings would not be revived but by bill, and the inrollment of decrees being now much disused, it is become the practice to revive in all cases indiscriminately by bill.”¹ The writer is not acquainted with any instance of such practice in the United States. The only methods of reviving a suit in equity in the Federal courts seem to be a bill of revivor, a bill in the nature of a bill of revivor, a bill of revivor and supplement, or a supplemental bill in the nature of a bill of revivor. It was held in one case that the personal representatives of a deceased defendant may voluntarily come in and be made a party upon motion.² When a board of public officers was abolished by statute and a new board substituted for it, it was held, without determining whether or not a revivor was necessary, that the members of the new board could properly be made parties to the suit by means of a bill of revivor.³

§ 179. Definition of Bills of Revivor and Parties to the Same.—

A bill of revivor is a continuance of the original bill, when, by death, some party to it has become incapable of prosecuting or defending a suit, or a female plaintiff has by marriage incapacitated herself from suing alone.¹ “Whenever a suit abates by death, and the interest of the person whose death has caused the abatement is transmitted to that representative which the law gives or ascertains, as an heir-at-law, executor, or administrator; so that the title cannot be disputed, at least in the court of chancery, but the person in whom the title is vested is alone to be ascertained; the suit may be continued by bill of revivor merely. If a suit abates by marriage of a female plaintiff, and no act is done to affect the rights of the party but the marriage, no title can be disputed; the person of the husband is the sole fact to be ascertained; and therefore the suit may be continued in this case likewise by bill of revivor merely.”² The persons who may be plaintiffs in a bill of revivor have been specified in a preceding section.³ If the abatement be caused by the death or marriage of a plaintiff, all previous defendants to the suit must be made

§ 178. Mitford's Chancery Pleadings, ch. 1, § 3.

² *Griswold v. Hill*, 1 Paine, 483. See U. S. R. S. § 955.

³ *Hemingway v. Stansell*, 106 U. S. 399, 402. See also *The Sapphire*, 11 Wall.

164; *Allen v. The Mayor*, 18 Blatchf. 239; s. c. 7 Fed. R. 483.

§ 179. ¹ Mitford's Pl. ch. 1, § 3; *Fitzpatrick v. Domingo*, 14 Fed. R. 216.

² Mitford's Pl. ch. 1, § 3.

³ § 177.

parties to the bill of revivor; unless it be filed after a decree, when all whose rights or duties have been fixed and ascertained thereby must be joined.⁴ If any of the previous plaintiffs refuse to join in the continuance of the suit, they also must be made defendants to the bill of revivor.⁵ If the abatement be caused by the death of a defendant, only his heirs or personal representatives, or both, according as the suit affected his interest in real or personal property, should be made defendants to the bill of revivor;⁶ unless the bill be filed after a decree, when all parties interested thereunder should be joined.⁷ There is no need of any difference of citizenship among the different parties to such a bill, provided that the court had jurisdiction of the original suit.⁸ A bill of revivor cannot be filed against the representatives of a defendant not served with process under the original bill.⁹ They can only be brought in by a bill in the nature of an original bill.¹⁰

§ 180. **Frame of a Bill of Revivor.** — A bill of revivor must state the filing of the original bill, and the several proceedings thereon, and the abatement;¹ but it need not set forth any of the statements in the original suit, unless the special circumstances of the case require it.² “It must show a title to revive, and charge that the cause ought to be revived, and stand in the same condition with respect to the parties in the bill of revivor as it was in with respect to the parties to the original bill at the time the abatement happened; and it must pray that the suit may be revived accordingly.”³ If a bill of revivor seeks simply to revive the suit, it prays only for a subpoena to revive. If it requires an answer, it should pray a subpoena to revive and answer.⁴ This is usually only required in two classes of cases. Where the bill is filed against an executor or administrator, and requires an admission of assets, the prayer usually is, not only that the suit may be revived, but also that, in case the defendant shall not ad-

⁴ Daniell's Ch. Pr. (2d Am. ed.) 1703, 1704.

⁵ Finch v. Lord Winchelsea, 1 Eq. Cas. Abr. 2; Daniell's Ch. Pr. (2d Am. ed.) 1700.

⁶ Bettes v. Dana, 2 Sumner, 383; Daniell's Ch. Pr. (2d Am. ed.) 1704.

⁷ Daniell's Ch. Pr. 1704.

⁸ Clarke v. Mathewson, 12 Pet. 164; s. c. 2 Sumner, 262.

⁹ United States v. Fields, 4 Blatchf. 326.

¹⁰ See § 174.

§ 180. ¹ Mitford's Pl. ch. 1, § 3.

² Rule 58.

³ Mitford's Pl. ch. 1, § 3.

⁴ Mitford's Pl. ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1707.

mit assets to answer the purposes of the suit, an account of the estate of the deceased party may be taken; "and so far the bill is in the nature of an original bill."⁵ "If a defendant to an original bill dies before putting in an answer, or after an answer to which exceptions have been taken, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer, must pray that the person against whom it seeks to revive the suit may answer the original bill, or so much of it as the exceptions taken to the answer of the former defendant extend to, or the amendment remaining unanswered."⁶ A bill of revivor should be signed by counsel, and in general comply so far as is practicable with the requirements for original bills.⁷

§ 181. *Proceedings upon Bills of Revivor.* — The Equity Rules provide that "whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor, or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course."¹ The Revised Statutes provide that "when either of the parties, whether plaintiff, petitioner, or defendant, dies before final judgment, the executor or administrator may, if the suit survives, prosecute or defend to final judgment. The defendant shall answer, and the cause will be heard and determined, and judgment rendered for or against the executor or administrator. If the executor or administrator neglects or refuses to become a party twenty days after being served with a *scire facias*, the court may nevertheless render judgment against the deceased party. The executor or administrator on becoming a party is entitled to a continuance

⁵ Mitford's Pl. ch. 1, § 3.

⁶ Mitford's Pl. ch. 1, § 3.

⁷ Daniell's Ch. Pr. (2d Am. ed.) 1707.

§ 181. ¹ Rule 56. See *Oliver v. Decatur*, 4 Cranch C. C. 592.

until the next term.”² The form of the subpœna upon a bill of revivor is the same as that upon an original bill, except that it states the nature of the bill to which the defendant is required to appear, and the time allowed him by the rules in which to do so.³ The subpœna is also sued out and served in the same manner as one upon an original bill;⁴ but substituted service of the subpœna upon the attorney of the defendant to the original bill may be allowed when the original defendant is beyond the reach of process.⁵ But it has been held that a suit cannot be revived against the foreign executor or administrator of a deceased defendant who has not taken out letters within the jurisdiction of the court, and has no assets there.⁶ If the defendant refuses to appear, process of contempt may be issued against him.⁷ A defendant who wishes to oppose the revivor, should demur or plead to the bill, or perhaps show cause by affidavit to the contrary.⁸ Where an answer is required that should probably accompany the demurrer or plea. It is not expedient to take in the answer any objection to the revivor. For the English rule was that an objection thus taken would not prevent the order to revive, and the point could then only be determined by bringing the cause regularly to a hearing.⁹

A bill of revivor is demurrable if it does not show a sufficient ground for reviving the suit or any part of it, either by or against the person by or against whom it is filed;¹⁰ for want of parties apparent upon its face, though not for the omission of such as had not appeared before, or were not before the court at the time of the abatement;¹¹ and for any serious defect in form. Upon a demurrer to a bill of revivor, the sufficiency of the original bill cannot be considered.¹² Should however, the original bill fail to state facts giving the Federal courts juris-

² U. S. R. S., § 955. See *Griswold v. Hill*, 1 Paine, 483.

³ *Daniell's Ch. Pr.* (2d Am. ed.) 1707.

⁴ *Daniell's Ch. Pr.* (2d Am. ed.) 1707.

⁵ *Dunn v. Clarke*, 8 Pet. 1, 2; *Norton v. Hepworth*, 1 Hall & Tw. 158. See § 96.

⁶ *Mellus v. Thompson*, 1 Cliff. 125.

⁷ *Daniell's Ch. Pr.* (2d Am. ed.) 1707.

⁸ *Daniell's Ch. Pr.* (2d Am. ed.) 1709, 1710; Rule 58.

⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 1709, 1711; *Harris v. Pollard*, 3 P. Wms. 348;

Lewis v. Bridgman, 2 Simons, 465; *Codrington v. Houlditch*, 5 Simons, 286.

¹⁰ *Harris v. Pollard*, 3 P. Wms. 348; *University College v. Foxcroft*, 2 Ch. Rep. 244; *Daniell's Ch. Pr.* (2d Am. ed.) 1709, 1710; *Story's Eq. Pl.* §§ 617, 829.

¹¹ *Metcalfe v. Metcalfe*, 1 Keen, 74; *Crowfoot v. Mander*, 9 Simons, 396; *Daniell's Ch. Pr.* (2d Am. ed.) 1710.

¹² *Mason v. Hartford, P. & F. Ry. Co.*, 19 Fed. R. 53, 55; *Sharon v. Terry*, 36 Fed. R. 337.

diction, that objection may be raised by a demurrer to the bill of revivor.¹³ If a bill of revivor be brought without sufficient cause to revive, and this be not apparent upon its face, or if the plaintiff is not entitled to revive the suit at all, though a title is stated in the bill so that it is not demurrable, the defendant may set up his objections to it by plea.¹⁴ The running of the statute of limitations after the time when a person became entitled to revive is also in most cases, except after a decree for an account,¹⁵ a defense and a bar to a bill of revivor, which may be set up by plea.¹⁶ No plea can be put in against a bill of revivor which has been pleaded to the original bill and overruled, although if a plea has been put in and the suit abated before argument, it may subsequently be pleaded anew to the original bill.¹⁷ When an answer to a bill of revivor is required, it must be confined to such matters as are called for by the bill, or as would be material to the defense with reference to the order made upon it.¹⁸ Allegations which might have been pleaded before abatement to the original bill will be considered as impertinent,¹⁹ and disregarded.²⁰ It will not, however, be impertinent, if it states matters of defense which have occurred since the answer to the original bill was filed, though these do not affect the title of the plaintiff to revive.²¹ Such an answer is impertinent when it describes and complains of irregularities in the suit before the abatement.²² Such an answer should be signed by counsel;²³ and exceptions will lie to it for insufficiency, scandal, and impertinence.²⁴ If it does not admit the plaintiff's title to revive or state any circumstances which he is desirous of controverting, it must, if the abatement has taken place after decree or issue joined in the original cause, be replied to.²⁵ Otherwise, a separate replication will be unnecessary, and one replication will put in issue both the allegations in that and

¹³ *Sharon v. Terry*, 36 Fed. R. 337.

¹⁴ *Daniell's Ch. Pr.* (2d Am. ed.) 1710; *Lewis v. Bridgman*, 2 Simons, 465.

¹⁵ *Hollingshead's Case*, 1 P. Wms. 742; *Daniell's Ch. Pr.* (2d Am. ed.) 1711.

¹⁶ *Daniell's Ch. Pr.* (2d Am. ed.) 1710; *Coit v. Campbell*, 82 N. Y. 509; *Perry v. Jenkins*, 1 Myl. & Cr. 122; *Mason v. Hartford, P. & F. Ry. Co.*, 19 Fed. R. 53, 56; *Story's Eq. Pl.* § 831.

¹⁷ *Daniell's Ch. Pr.* (2d Am. ed.) 1711.

¹⁸ *Daniell's Ch. Pr.* (2d Am. ed.) 1711; *Story's Eq. Pl.* § 868 *a*.

¹⁹ *Nanney v. Tottey*, 11 Price, 117.

²⁰ *Gunnell v. Bird*, 10 Wall. 304, 308; *Fretz v. Stover*, 22 Wall. 198, 204.

²¹ *Langley v. Overton*, 10 Simons, 345.

²² *Wagstaff v. Bryan*, 1 R. & M. 28.

²³ *Daniell's Ch. Pr.* (2d Am. ed.) 1712.

²⁴ *Wagstaff v. Bryan*, 1 R. & M. 28; *Daniell's Ch. Pr.* (2d Am. ed.) 1712.

²⁵ *Daniell's Ch. Pr.* (2d Am. ed.) 1712.

those in the original answer.²⁶ In all other respects, the form and the proceedings upon demurrers, pleas, and answers to bills of revivor should conform as nearly as possible to those of and upon similar pleadings to original bills.²⁷ A bill of revivor need not be set down for a hearing, unless it prays other relief than a mere revivor.²⁸ Where a bill of revivor seeks merely an admission of assets and a revivor, and the defendant admits assets, the cause may proceed upon the order of revivor merely.²⁹ If, however, any issue is joined upon the answer to it, a hearing will be necessary.³⁰ The sole questions before the court when a bill of revivor is filed are the competency of the parties by and against whom it is filed, and the frame of the bill.³¹ A cause is not revived until an order of revivor has been entered.³²

§ 182. **Bills in the Nature of Bills of Revivor in general.**—A bill in the nature of a bill of revivor is a bill filed “to obtain the benefit of a suit after abatement in certain cases which do not admit of a continuance of the original bill.”¹ “If the death of a party whose interest is not determined by his death is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the court of chancery,” as in the case of a devise² or conveyance³ of real estate, “the suit is not permitted to be continued by a bill of revivor. An original bill upon which the title may be litigated must be filed, and this bill will so far have the effect of a bill of revivor that if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by a bill of revivor.”⁴ “The bill is said to be original merely for want of that privity between the party to the former and the party to the latter bill, though claiming the same interest, which would have permitted the continuance of the suit by bill of revivor. Therefore, when the validity of the alleged

²⁶ *Catton v. Earl of Carlisle*, 5 Madd. 427; *Daniell's Ch. Pr.* (2d Am. ed.) 1712.

²⁷ *Daniell's Ch. Pr.* (2d Am. ed.) 1711, 1712.

²⁸ *Pruen v. Lunn*, 5 Russ. 3; *Daniell's Ch. Pr.* (2d Am. ed.) 1713.

²⁹ *Mitford's Pl. ch. 1*, § 3; *Daniell's Ch. Pr.* (2d Am. ed.) 1713.

³⁰ *Daniell's Ch. Pr.* (2d Am. ed.) 1713; *Mitford's Pl. ch. 1*, § 3.

³¹ *Bettes v. Dana*, 2 Sumner, 383.

³² *Atterbury v. Gill*, 13 Off. Gaz. 276.

§ 182. ¹ *Mitford Pl. ch. 1*, § 3. See *Slack v. Walcott*, 3 Mason, 508, 512; *Sharon v. Terry*, 36 Fed. R. 337, 353.

² *Slack v. Walcott*, 3 Mason, 508.

³ *Sharon v. Terry*, 36 Fed. R. 337.

⁴ *Mitford's Pl. ch. 1*, § 3. See *Slack v. Walcott*, 3 Mason, 508.

transmission of interest is established, the party to the new bill shall be equally bound by, or have advantage of the proceedings in the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest; and the suit is considered as pending from the time of the filing of the original bill, so as to save the statute of limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross-bill, and every other advantage which would have attended the institution of the suit by original bill, if it could have been continued by bill of revivor merely.”⁵ So the pleadings filed and any testimony taken in the original cause can be used in the same manner in the second cause after a bill in the nature of a bill of revivor has been filed.⁶ Such a bill can only be filed for the purpose of bringing in a person who claims in privity with the party whose death caused the abatement.⁷ Thus, if a bill is filed by a devisee under a will, and afterwards a subsequent will is proved, the devisee under the second will can in no way avail himself of the proceedings in the suit; for there is no privity between him and the original plaintiff. If, however, a bill has been filed by the devisor himself for some matter concerning the estate devised, the second devisee may file a supplemental bill in the nature of a bill of revivor, even if the first devisee have already filed such a bill; for he derives his title to do so solely from the devisor independently of the first devisee.⁸ When the court had jurisdiction of the original suit, a want of difference of citizenship between the parties to the bill in the nature of a bill of revivor will not be a defect in it.⁹

§ 183. **Frame of Bills in the Nature of Bills of Revivor and Proceedings upon them.**—A bill in the nature of a bill of revivor “must state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party dead has been transmitted; and it must charge the validity of the transmission, and state the rights which have accrued by it.”¹

⁵ Mitford's Pl. ch. 1, § 3.

⁶ *Slack v. Walcott*, 3 Mason, 508; *Vattier v. Hinde*, 7 Pet. 252, 266; Story's Eq. Pl. §§ 371-387; Daniell's Ch. Pr. (2d Am. ed.) 1719.

⁷ Daniell's Ch. Pr. 1720; Story's Eq. Pl. § 385; *Rylands v. Latouche*, 2 Bligh, 585; *Tonkin v. Lethbridge*, G. Cooper, 43.

⁸ *Oldham v. Eboral*, Cooper Select Cases, 27.

⁹ *Clarke v. Mathewson*, 12 Pet. 164; s. c. 2 Sumner, 262; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609.

§ 183. ¹ Mitford's Eq. Pl. ch. 1, § 3.

It usually prays that the original suit may be revived, and the party filing it have the benefit of the former proceedings therein.² Probably a subpœna issued in accordance with its prayer may be served upon the attorney of an absent defendant, who had already appeared, in the same manner as a subpœna upon a bill filed to stay proceedings at law.³ Otherwise the form and the proceedings upon bills in the nature of bills of revivor are the same as those upon bills of revivor;⁴ and the difference between the two is practically one of mere nomenclature.⁵

§ 184. **Bills of Revivor and Supplement.** — A bill of revivor and supplement is a bill which revives a suit after an abatement, and at the same time supplies a defect which has arisen in it since its institution.¹ Thus, where by the death of a defendant new rights accrue to the plaintiffs, a bill of revivor and supplement is necessary to state those rights;² and where, in a suit to restrain the infringement of a patent, the complainant assigned his interest and died, it was held improper for the assignee to revive the suit by a bill of revivor, the court saying that a "supplemental bill," but evidently intending thereby a bill of revivor and supplement, must be filed.³ It has been held in England that by such a bill a defect apparent upon the face of the original bill cannot be cured.⁴ A bill of revivor and supplement is merely a compound of a bill of revivor and a supplemental bill, and in its separate parts must be framed and proceed in the same manner.⁵ It seems that it may be held good as to the revivor, and bad as to the supplemental matter.⁶ All parties to the original bill should be made parties to a bill of revivor and supplement, although a revivor is sought against but one defendant.⁷

§ 185. **Supplemental Bills in the Nature of Bills of Revivor.** — A supplemental bill in the nature of a bill of revivor is a bill filed to cure an abatement when the person by or against whom the

² Daniell's Ch. Pr. 1721; Story's Eq. Pl. § 386.

³ Norton v. Hepworth, 1 Hall & Tw. 158; Dunn v. Clarke, 8 Pet. 1, 2. See § 96.

⁴ Daniell's Ch. Pr. 1720, 1721; Rule 56.

⁵ Grew v. Breed, 12 Met. (Mass.) 369.

§ 184. ¹ Mitford's Pl. ch. 1, § 2; Story's Eq. Pl. §§ 387, 627; Daniell's Ch. Pr. (2d Am. ed.) 1722, 1723.

² Westcott v. Cady, 5 J. Ch. (N. Y.) 334, 342.

³ Metal Stamping Co. v. Crandall, 18 Off. Gaz. 1531.

⁴ Bampton v. Birchall, 5 Beav. 330; s. c. on appeal, 1 Phil. 568.

⁵ Mitford's Pl. ch. 1, § 3; Story's Eq. Pl. §§ 387, 627; Daniell's Ch. Pr. 1722, 1723; Pendleton v. Fay, 3 Paige (N. Y.), 204.

⁶ Randolph v. Dickerson, 5 Paige (N. Y.), 517. But see Bampton v. Birchall, 5 Beav. 330; s. c. on appeal, 1 Phil. 568.

⁷ Lake v. Austwick, 4 Jur. 314.

suit is to be continued, although claiming under the individual whose death caused the abatement, is not the representative whom the law allows to be recognized, but is one whose title could not have been litigated in the English Court of Chancery, but might have been disputed before another tribunal.¹ It has also been held that where during the pendency of a suit a trustee died, and the court appointed a successor to him, the new trustee could only be brought in by a supplemental bill in the nature of a bill of revivor.² Upon the death of an assignee in bankruptcy or insolvency his successor is brought in by a bill of this character.³ Such a bill, however, although designated as being in the nature of a bill of revivor, is neither more nor less than a supplemental bill.⁴

§ 186. **What renders a Suit defective.** — If, after the institution of a suit in equity, a person who is a necessary party thereto comes into being, or any other event occurs, which, without abating the suit, occasions such an alteration in the interest of any of the original parties, or gives any person not a party such an interest therein, as makes it necessary that the change of interest shall be brought to the attention of the court, and the person not already a party brought before it, the suit is said to become defective.¹ The circumstances causing the change of interest must then be alleged, and the new party brought in by a supplemental bill, or a bill in the nature of a supplemental bill.² An assignment, whether voluntary³ or by operation of law,⁴ during the pendency of a suit, of the whole or a part of a party's interest therein, does not make the suit defective, nor affect the rights of the other parties, since the assignee takes the same rights and is subject to the same obligations as his assignor, and is equally bound or benefited by the decree. The assignee need not, therefore, be made a party,⁵ unless the assignment disables the assignor from performing the decree of the court, when he should be brought before it;⁶ but he may at any time be brought in at his

§ 185. ¹ Daniell's Ch. Pr. (2d Am. ed.) 1721.

² Greenleaf v. Queen, 1 Pet. 138, 148.

³ Daniell's Ch. Pr. (2d Am. ed.) 1721.

⁴ Daniell's Ch. Pr. (2d Am. ed.) 1721.

§ 186. ¹ Jones v. Jones, 3 Atk. 217; Mitford's Pl. ch. 1, § 2; Daniell's Ch. Pr. (2d Am. ed.) 1663.

² Jones v. Jones, 3 Atk. 217; Mitford's

Pl. ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1663.

³ *Ex parte* Railroad Co., 95 U. S. 221.

⁴ Hewett v. Norton, 1 Woods, 68; Eyster v. Gaff, 91 U. S. 521.

⁵ Eyster v. Gaff, 91 U. S. 521; *Ex parte* Railroad Co., 95 U. S. 221.

⁶ Daniell's Ch. Pr. (2d Am. ed.) 1664.

own request.⁷ It has been said that a person entitled to the benefit of a decree by his subsequent acquisition of an interest in the subject-matter in controversy is not entitled to invoke the aid of the court or take further action until he has made himself a party by a supplemental bill or other appropriate pleading, and has thus brought in the representatives or successors in interest of the original parties, plaintiff or defendant.⁸ In a case in admiralty, it was held that a suit brought in the name of Napoleon III., on account of an injury to property, — a French ship held by him in his sovereign capacity, — did not abate by his deposition and the succession of the French Republic to the French Empire, and that the name of the plaintiff could at any time be changed by order.⁹

§ 187. **Supplemental Bills.** — A supplemental bill, according to Lord Redesdale, is merely an addition to the original bill.¹ At first supplemental bills were filed, not only for the purposes mentioned in the last section, but also to supply such defects as might have been cured by amendment after the time to perfect a bill by amendment had expired.² Now, however, that amendments may be allowed at any stage of a suit,³ they are no longer needed for that purpose; and as the fact that the matter pleaded in a supplemental bill may be inserted in the original bill by amendment, was also a good ground of demurrer,⁴ it is very doubtful whether they can be any longer so used.⁵ When an event happens subsequently to the filing of an original bill which gives a new interest in the matter in dispute to any person, whether or not already a party, without depriving all of the original plaintiffs suing in their own right of their interest, the defect arising from this event may be supplied by a supplemental bill.⁶ A remainder-man may also, in this same man-

⁷ *Foster v. Deacon*, Mad. & Geld. 59; 299; *Mosgrove v. Kountze*, 14 Fed. R. 315.
⁸ *Eyster v. Gaff*, 91 U. S. 521; *Ex parte Railroad Co.*, 95 U. S. 221, 226.

⁹ *Secor v. Singleton*, 41 Fed. R. 725, 726.

¹ *The Sapphire*, 11 Wall. 164. See *Allen v. The Mayor*, 7 Fed. R. 483; s. c. 18 Blatchf. 239; *Hemingway v. Stansell*, 106 U. S. 399, 402.

² § 187. ¹ Mitford's Pl. ch. 1, § 2.

³ Mitford's Pl. ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1653-1663; Story's Eq. Pl. § 334; *Jenkins v. Eldredge*, 3 Story,

⁴ Rule 29.

⁵ Mitford's Pl. ch. 2, § 2, part 1; Daniell's Ch. Pr. (2d Am. ed.) 1681.

⁶ *Tubman v. Wason Manuf. Co.*, 44 Fed. R. 429; *Electrical Accumulation Co. v. Brush Electric Co.*, 44 Fed. R. 602. See, however, *Davies v. Williams*, 1 Simons, 5.

⁷ *Hobson v. McArthur*, 16 Pet. 182; Daniell's Ch. Pr. 1663-1675; Story's Eq. Pl. §§ 366-343; Mitford's Pl. ch. 1 § 3.

ner, be made a party to a suit brought by or against a tenant in tail upon the determination of the latter's estate, and the acquisition by the former of the present interest to the property in litigation.⁷ A supplemental bill which brings in a new party may be original as to him, but supplemental as to the rest.⁸ If, pending a suit, a tenant in tail of an estate thereby affected by it is born;⁹ or if, pending a suit against a husband and wife concerning the latter's estate, the man dies, and the wife thus acquires a new interest;¹⁰ or if one of two or more plaintiffs suing in their own right is entirely deprived of his interest, by any other event than an assignment of it;¹¹ or if the interest of a sole plaintiff suing in a representative capacity entirely determines by death or otherwise, and some other person becomes entitled to the same property under the same title,¹² — the defect in the suit thereby occasioned must be cured by a supplemental bill. So, if pending a suit a party becomes a lunatic, or if pending a suit by or against a lunatic and his committee a new committee is appointed, the committee should be brought in by a supplemental bill.¹³ According to Lord Redesdale, upon the death of one suing in behalf of himself and others in the same position with him, if his representative do not choose to file a bill of revivor, any one of the class on behalf of whom he sued may revive;¹⁴ but it seems that the more proper course would be for the one wishing to continue the suit to do so by means of a supplemental bill, which he can only obtain leave to file upon notice to the representatives of the deceased plaintiff, as well as to the defendants.¹⁵ Where, however, a suit brought by one in a representative capacity becomes defective by his death, and another acquires the right to continue it under a different title, — as upon the death of an executor or administrator succeeded by an administrator *de bonis non*, according to Lord Redesdale and Daniell, the latter may continue by a bill of revivor,¹⁶ according to Judge

⁷ Lloyd *v.* Johnes, 9 Ves. 37; Daniell's Ch. Pr. (2d Am. ed.) 1668-1672.

⁸ Mitford's Pl. ch. 1, § 3.

⁹ Mitford's Pl. ch. 1, § 3.

¹⁰ Daniell's Ch. Pr. (2d Am. ed.) 1663.

¹¹ Mitford's Pl. ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1664.

¹² Mitford's Pl. ch. 1 § 3; Daniell's Ch. Pr. (2d Am. ed.) 1665; Marriott *v.* Tarp-ley, 9 Simons, 279.

¹³ Mitford's Pl. ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1664.

¹⁴ Mitford's Pl. ch. 1, § 3.

¹⁵ Houlditch *v.* Marquis Donnegall, 1 Sim. & S. 491; Dixon *v.* Wyatt, 4 Madd. 392; Daniell's Ch. Pr. (2d Am. ed.) 1671, 1672; Story's Eq. Pl. § 365.

¹⁶ Mitford's Pl. ch. 1, § 3; Daniell's Ch. Pr. (2d Am. ed.) 1665; Owen *v.* Curzon, 2 Vern. 237; Huggins *v.* York Buildings Co. 2 Eq. Abr. 3 pl. 14.

Story, only by a bill in the nature of revivor;¹⁷ in no case by a supplemental bill. It has been held that in a case where the defendant is entitled to affirmative relief in his answer without a cross-bill, as a suit under § 4918 of the Revised Statutes, the complainant may plead in a supplemental bill any matter in defence to such a claim for affirmative relief that he might have pleaded by supplemental answer to a cross-bill, had one been filed.¹⁸ A supplemental bill must not be inconsistent with the original bill. Thus, where the original bill stated that the defendants claimed to be a corporation, but were not incorporated, it was held improper to file a supplemental bill claiming relief upon the ground that the defendants were a corporation.¹⁹

188. Parties and Frame of a Supplemental Bill.—As a general rule, all parties to the original suit must be made such to a supplemental bill filed to supply a defect in it,¹ unless such a bill be filed to bring in a mere formal defendant, or to allege matter which cannot possibly affect a decree against more than one defendant, when the others need not be made parties to it.² An objection for want of parties must, however, be made by demurrer, plea, answer, or when the motion for leave to file the bill is argued. It will be too late to make it at the hearing.³ If the court had jurisdiction of the original bill it will take jurisdiction of the supplemental bill, no matter what may be the citizenship of the new parties;⁴ provided at least that they have a right to sue and be sued in a Federal court.⁵ “Supplemental bill must state the original bill, and the proceedings thereon, and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties.⁶ The equity rules provide that “it shall not be necessary in any supplemental bill to set forth any of the statements in the original suit, unless the special circum-

¹⁷ Story's Eq. Pl. § 382, n. 1.

¹⁸ *Electrical Accumulation Co. v. Brush Electric Co.*, 44 Fed. R. 602, 607; *supra*, §§ 154, 171.

¹⁹ *Maynard v. Green*, 30 Fed. R. 643.

§ 188. ¹ *Daniell's Ch. Pr.* (2d Am. ed.) 1678; *Jones v. Jones*, 3 Atk. 217; *Dyson v. Morris*, 1 Hare, 413; *Jones v. Howells*, 2 Hare, 342.

² *Greenwood v. Atkinson*, 5 Simons, 419; *Dyson v. Morris*, 1 Hare, 413; *Wil-*

kinson v. Fowkes, 9 Hare, 193; Story's Eq. Pl. § 343.

³ *Jones v. Jones*, 3 Atk. 217.

⁴ *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609. See § 21.

⁵ See *Adams Express Co. v. Denver & R. G. Railway Co.*, 16 Fed. R. 712; *Omaha Horse Railway Company v. Cable Tramway Company of Omaha*, 33 Fed. R. 689.

⁶ *Mitford's Pl. ch. 1*, § 3.

stances of the case require it.”⁷ This, however, although copied from an English Chancery order,⁸ is merely a reaffirmance of the pre-existing practice.⁹ If the bill brings in no new party, there is never any need of its containing any of the statements in the original pleadings.¹⁰ When, however, it brings in a new party, as it is in fact original as to him, it must state enough of the former proceedings to show an equity against him.¹¹ This need not be averred positively; but it will be sufficient to state that such matters were alleged in the former bill or answer,¹² and only so much of the original pleadings need be averred as suffice to show an equity against the new party.¹³ The prayer of a supplemental bill is adapted to the object for which it is exhibited. It formerly always concluded with a prayer for process in the usual form.¹⁴ Whether this is now necessary when no new defendants are brought in may be doubted.¹⁵ It should be signed by counsel, and in other respects conform to the form of an original bill.¹⁶ A supplemental bill may be filed at any time during the progress of a suit, as well after as before a decree,¹⁷ and even during the pendency of an appeal.¹⁸ It seems, however, that if the matters which make it necessary or advisable were known to the party filing it before the entry of the decree, afterwards it will be too late;¹⁹ though such an objection must be taken before the hearing upon the supplemental bill.²⁰

§ 189. **Proceedings upon Supplemental Bills.** — “Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be

⁷ Rule 58.

⁸ See Order 47 in Chancery, of August, 1841.

⁹ Daniell's Ch. Pr. (2d Am. ed.) 1675-1678.

¹⁰ Daniell's Ch. Pr. (2d Am. ed.) 1675.

¹¹ Baldwin v. Mackown, 3 Atk. 817; Daniell's Ch. Pr. (2d Am. ed.) 1675, 1676.

¹² Lloyd v. Jones, 9 Ves. 37; Daniell's Ch. Pr. (2d Am. ed.) 1676.

¹³ Vigers v. Lord Audley, 9 Simons, 72; Attorney-General v. Foster, 2 Hare, 81; Daniell's Ch. Pr. (2d Am. ed.) 1676, 1677.

¹⁴ Daniell's Ch. Pr. 1680.

¹⁵ See Shaw v. Bill, 95 U. S. 10.

¹⁶ Daniell's Ch. Pr. (2d Am. ed.) 1680.

¹⁷ Daniell's Ch. Pr. (2d Am. ed.) 1659, 1660; Story's Eq. Pl. §§ 338, 338 a; 2 Barbour's Ch. Pr. 167; O'Hara v. Shepherd, 3 Maryland Ch. Dec. 306; Jenkins v. Eldredge, 3 Story, 299; Woodward v. Woodward, 1 Dickens, 33; Dormer v. Fortescue, 3 Atk. 124; Secor v. Singleton, 41 Fed. R. 725.

¹⁸ Woodward v. Woodward, 1 Dickens, 33.

¹⁹ Pendleton v. Fay, 3 Paige (N. Y.), 204; Story's Eq. Pl. § 338 a.

²⁰ Fulton Bank v. New York & Sharon Canal Co., 4 Paige (N. Y.), 127.

filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day, upon proper cause shown and due notice to the other party. And if leave is granted to file such a supplemental bill, the defendant shall demur, plead, or answer thereto, on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court."¹ The petition for leave to file such a bill need not state the averments which are intended to be inserted therein; but must state sufficient to advise the opposite parties and the court of the ground upon which the relief is sought.² It has been held that upon the return of the order to show cause an objection which is a proper ground for a demurrer cannot be raised.³ The objection that a supplemental bill was filed without leave is not a ground of demurrer, but only for a motion to dismiss which rests in the discretion of the court.⁴ A motion will not lie to take a supplemental bill off the file for irregularity upon the ground that it does not state supplemental matter.⁵ The proper course in such a case is to demur, or to object to the order allowing it to be filed.⁶ Such a motion might, however, be granted if a bill filed should be different from that which the order allowed. A supplemental bill filed without leave may by a subsequent order be allowed to remain on the file.⁷ No subpœna need be issued upon such a bill unless new defendants are to be brought in; and then they only need be served with process.⁸ Such a subpœna is in the same form as one issued upon the filing of an original bill, except that it specifies the nature of the bill upon which it is issued.⁹ A demurrer to a supplemental bill is in general subject to the same rules, except as to the time of filing the same, and will lie for the same reasons as if the bill were original;¹⁰ but there are some grounds of demurrer peculiar to bills of this class. Thus, a demurrer will lie if it appears upon the face of the bill that it pleads matters which occurred before the institution of

§ 189. ¹ Rule 57.

² *Parkhurst v. Kinsman*, 2 Blatchf. C. C. 72.

³ *Oregon & Transcontinental Co. v. Northern Pac. Ry. Co.*, 32 Fed. R. 428.

⁴ *Henry v. Travelers' Ins. Co.*, 45 Fed. R. 299, 303.

⁵ *Bowyer v. Bright*, 13 Price, 316; *Daniell's Ch. Pr.* (2d Am. ed.) 1682.

⁶ *Bowyer v. Bright*, 13 Price, 316; *Daniell's Ch. Pr.* (2d Am. ed.) 1682.

⁷ *Mackintosh v. Flint & P. M. R. Co.*, 34 Fed. R. 582.

⁸ *Shaw v. Bill*, 95 U. S. 10, 14.

⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 1680.

¹⁰ *Daniell's Ch. Pr.* (2d Am. ed.) 1681;

Secor v. Singleton, 41 Fed. R. 725.

the suit, and which it is not too late to insert by amendment into the original bill.¹¹ A supplemental bill is demurrable where it shows on its face that the plaintiff knew the facts therein alleged before his time to amend had expired.¹² A supplemental bill is demurrable if when filed after a decree for an account it pleads matter which it shows that the plaintiff knew before the decree.¹³ A supplemental bill is demurrable when filed to introduce a claim founded upon a title entirely distinct from that in the original bill; as, when a man first sued claiming as heir-at-law, and afterwards sought by supplemental bill to plead a purchase of the interest of the true heir-at-law.¹⁴ A supplemental bill is demurrable if it is brought against a person who neither has nor claims any interest in the subject-matter of the original suit.¹⁵ In a suit to restrain the infringement of a patent, "where the patent expires and is extended pending the litigation, and the infringement by the respondent is continued in respect to the extended patent, a supplemental bill is a proper pleading to prolong the suit, as in that state of the case the complainant may well claim, if he is the original and first inventor of the improvement, to recover of the respondent the gains and profits made by the infringement, both before and subsequent to the extension; but the rule is otherwise where the original patent is surrendered, as the effect of the surrender is to extinguish the patent, and hence it can no more be the foundation for the assertion of a right than can a legislative act which has been repealed without any saving clause of pending actions. Consequently, the infringement of the reissued patent becomes a new cause of action for which, in the absence of any agreement or implied acquiescence of the respondent, no remedy can be had except by the commencement of a new suit."¹⁶ Where, however, the defendant made no objection to the complainant's filing a supplemental bill setting forth an infringement of the reissued patent, but filed

¹¹ Mitford's Pl. ch. 2, § 2, part 1; Story's Eq. Pl. § 614; Stafford v. Howlett, 1 Paige (N. Y.), 200.

¹² Henry v. Travelers' Ins. Co., 45 Fed. R. 299, 302.

¹³ Henry v. Travelers' Ins. Co., 45 Fed. R. 299, 303.

¹⁴ Tonkin v. Lethbridge, G. Cooper, 43; Daniell's Ch. Pr. (2d Am. ed.) 1681.

¹⁵ Baldwin v. Mackown, 3 Atk. 817; Mitford's Pl. ch. 2, § 2, part 1; Daniell's Ch. Pr. (2d Am. ed.) 1681.

¹⁶ Mr. Justice Clifford in Reedy v. Scott, 23 Wall. 352, 364, 365. See also Fry v. Quinlan, 13 Blatchf. 205; Jones v. Barker, 11 Fed. R. 597. But compare Woodworth v. Stone, 3 Story, 749; Reay v. Raynor, 19 Fed. R. 308.

to it a plea similar to that which he had previously filed to the original bill, it was held that he had waived his right to object upon appeal that the suit was improperly continued, and that an original bill should have been filed.¹⁷ After the complainant had finished taking testimony in a suit for the infringement of a patent and an account, he was allowed to file a supplemental bill setting up infringements which had occurred after the filing of the original bill.¹⁸

Any objections to a supplemental bill which do not appear upon its face may be taken by plea or answer, which, in general, are subject to the same rules as pleas and answers to original bills.¹⁹ If a defendant has not answered the original bill, his successor may be called upon in the supplemental bill to do so.²⁰ When that is done, the usual course is to include the answer to the original and that to the supplemental bill in the same pleading,²¹ although it is not absolutely irregular to separate them.²² A defense cannot be pleaded to a supplemental bill which has previously been pleaded to the original bill and overruled.²³ If the plaintiff wish to join issue upon averments in the answer, he may file a replication to it.²⁴ If there has been no replication filed in the original suit, however, a single general replication will apply to the whole record, and put at issue the allegations in both answers.²⁵ If the new matter in the supplemental bill is not admitted, it must be proved, or the bill will be dismissed with costs.²⁶ For this purpose evidence may be taken and a hearing had as upon an original bill.²⁷ If there has been no previous hearing and decree, both bills may be brought to a hearing together, and a single decree will suffice for both.²⁸ If the supplemental bill is heard alone, the evidence taken in the original suit may be read in support of or in opposition to it.²⁹ The effect of a supplemental bill when sustained is to put the suit in the same condition as if the supplemental matter had

¹⁷ *Reedy v. Scott*, 23 Wall. 352.

¹⁸ *Turrell v. Spaeth*, 9 Off. Gaz. 1163.

¹⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 1682.

²⁰ *Vigers v. Lord Audley*, 9 Simons, 408.

²¹ *Vigers v. Lord Audley*, 9 Simons, 408.

²² *Sayle v. Graham*, 5 Simons, 8.

²³ *Pentlarge v. Pentlarge*, 22 Fed. R. 412.

²⁴ *Daniell's Ch. Pr.* (2d Am. ed.) 1683; *Perkins v. Hendryx*, 31 Fed. R. 522.

²⁵ *Catton v. Earl of Carlisle*, 5 Madd. 427.

²⁶ *Daniell's Ch. Pr.* (2d Am. ed.) 1683; *Pedrick v. White*, 1 Met. (Mass.) 76.

²⁷ *Lloyd v. Johnes*, 9 Ves. 37; *Daniell's Ch. Pr.* (2d Am. ed.) 1683.

²⁸ *Mitford's Pl. ch. 1*, § 3; *Daniell's Ch. Pr.* (2d Am. ed.) 1684, 1685.

²⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 1684; *Turrell v. Spaeth*, 9 Off. Gaz. 1163.

been alleged, and the new party, if any, brought in at its institution.³⁰

§ 190. **Bills in the Nature of Supplemental Bills in general.** — A bill in the nature of a supplemental bill is a bill filed to obtain the benefit of a suit, either after an abatement which cannot be cured by a bill of revivor or a bill in the nature of a bill of revivor, or after the suit has become defective in cases which do not admit of a supplemental bill to supply that defect.¹ Cases frequently occur in practice where the interest of an original party to a suit is completely determined, and another person becomes interested in the subject-matter by a title not derived from the other, but in such a manner as to make it proper that the benefit of the former proceedings should be had by or against the latter, without incurring the expense of commencing an entirely new proceeding. In such a case, the benefit of the former proceedings may be obtained by means of a bill called an original bill in the nature of a supplemental bill, or a bill in the nature of a supplemental bill.² Such a bill must also be filed to bring into a suit the assignee of a sole plaintiff who had acquired his interest during its pendency.³ The reason given for this is the doctrine of maintenance, in consequence of which "it is not enough for the new plaintiff to state that his assignor instituted a suit and assigned to him the benefit of it; he must show that his assignor had the property in respect of which the suit was instituted, and that that property has been assigned and carries with it the right to sue."⁴ So, where a defendant dies before appearance or a decree against him *pro confesso*, his successor can only be brought in by a bill in the nature of a supplemental bill, which, however, is considered merely supplemental as to the other defendants.⁵

§ 191. **Frame of a Bill in the Nature of a Supplemental Bill.** — A bill in the nature of a supplemental bill "must state the

³⁰ Daniell's Ch. Pr. (2d Am. ed.) 1666, 1667.

§ 190. ¹ Mitford's Pl. ch. 1, § 3; Campbell v. New York, 35 Fed. R. 14; Tappan v. Smith, 5 Biss. 73. But see Secor v. Singleton, 41 Fed. R. 725, 726.

² Daniell's Ch. Pr. (2d Am. ed.) 1685; Mitford's Pl. ch. 1, § 3.

³ Daniell's Ch. Pr. (2d Am. ed.) 1667; Campbell v. New York, 35 Fed. R. 14;

Tappan v. Smith, 5 Biss. 73. But see Hoxie v. Carr, 1 Sumner, 173; Sedgwick v. Cleveland, 7 Paige (N. Y.), 290.

⁴ White on Supplement and Revivor, 126, 174; Daniell's Ch. Pr. (2d Am. ed.) 1667.

⁵ United States v. Fields, 4 Blatchf. 326; Crowfoot v. Mander, 9 Simons, 396; Asbee v. Shipley, Mad. & Gold, 206; Daniell's Ch. Pr. (2d Am. ed.) 1673.

original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then show the ground upon which the court ought to grant the benefit of the former suit to or against the person so become entitled, and pray the decree of the court adapted to the case of the plaintiff in the new bill."¹ It will not be impertinent for it to restate allegations of the bill or answer in the original suit, nor to charge new matter which occurred before the original bill was filed, for the purpose of meeting a defense in the original answer.² But a bill in the nature of a supplemental bill need contain no more of the allegations in the original bill than suffices to show a cause of action against the defendants to it.³ Otherwise, its form should be, as far as possible, in compliance with that of an original bill. If, however, its object be merely to obtain the benefit of the proceedings in the original suit, the want of the difference of citizenship necessary to support an independent original bill will not deprive the court of jurisdiction of it, provided the first suit were properly brought.⁴

§ 192. Proceedings upon Bills in the Nature of Supplemental Bills. — A bill in the nature of a supplemental bill is filed in the same manner as a supplemental bill, and the same rule governs the time of the filing of pleadings to it.¹ Otherwise, proceedings upon bills in the nature of supplemental bills resemble those upon independent original bills.² According to Lord Redesdale, "a new defense may be made; the pleadings and depositions cannot be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the court to make a similar decree."³ As has been remarked by Lord Eldon, this passage contains an obscurity of language which is due to an obscurity in the subject.⁴ But the probable meaning and the view of the matter best supported by authority is, that

§ 191. ¹ Mitford's Pl. ch. 1, § 3.

² *Woods v. Woods*, 10 Simons, 197; *Attorney-General v. Foster*, 2 Hare, 81; *Daniell's Ch. Pr.* (2d Am. ed.) 1667, 1668.

³ *Daniell's Ch. Pr.* (2d Am. ed.) 1675-1677; *Vigers v. Lord Audley*, 9 Simons, 72.

⁴ *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609.

§ 192. ¹ Rule 57. See § 189.

² *Mexican Ore Co. v. Mexican Guadalupe Mining Co.*, 47 Fed. R. 351, 356.

³ Mitford's Pl. ch. 1, § 3.

⁴ *Lloyd v. Jones*, 9 Ves. 37, 56.

upon the filing of what is called a bill in the nature of a supplemental bill, no further benefit of the proceedings in the original suit can be obtained than would be if it were styled merely an original bill; and the admission of the evidence and admissions and the benefit of the decree in the former suit will only be allowed when the parties to the second are in privity with those to the first suit.⁵

⁵ Daniell's Ch. Pr. (2d Am. ed.) 1685-1688.

CHAPTER XV.

INTERLOCUTORY APPLICATIONS AND PETITIONS.

§ 193. Definition and Classification of Interlocutory Applications.

— An interlocutory application is a request, not incorporated in a bill, made to the court for its interference in a matter arising in a cause either before or after a decree. An interlocutory application is made by motion on petition.

§ 194. Definition and Classification of Motions. — A motion has been defined as “an application either by a party or his counsel, not founded upon any written statement addressed to the court.”¹ But the rules of the Supreme Court of the United States provide that “all motions hereafter made to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.”² And most motions are supported by affidavits. Motions are either of course or special. Special motions are either *ex parte* or upon notice.

§ 195. Motions of Course. — Motions of course are those which, by some rule or practice of the court, are invariably granted without notice, and to which no opposition is allowed.¹ In Federal equity practice, the term is usually confined to such motions as are granted as of course by the clerk without the intervention of a judge of the court.² The equity rules provide that “all motions and applications in the clerk’s office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk’s office which do not by the rules hereinafter prescribed require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications grantable of

§ 194. ¹ Daniell’s Ch. Pr. (2d Am. ed.) 1787. See the language of Folger, J., in *Shaft v. Phoenix Mutual Life Ins. Co.*, 67 N. Y. 544, 547.

² Supreme Court Rule 6.

§ 195. ¹ Daniell’s Ch. Pr. (2d Am. ed.) 1599; *United States v. Parrott*, 1 McAll. 447, 454.

² *Robinson v. Satterlee*, 3 Saw. 134, 141.

course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.”³ The order dismissing a bill for an omission to duly file a replication is an order as of course.⁴ It has been held that an order for the issue of a commission is not.⁵ “The clerk’s office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.”⁶ “All motions, rules, orders, and other proceedings made and directed at chambers, or on rule-days at the clerk’s office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk’s office, on the day when they are made and directed, which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book, touching any and all the matters in the suits to and in which they are parties and solicitors.”⁷

§ 196. **Special Motions without Notice.** — A special motion is a motion which can only be granted by a judge of the court under special circumstances or in his discretion.¹ Such motions are either upon notice or without notice. Orders granted upon motions without notice are said to be *ex parte*; and the same term is applied to the motions upon which they are granted. An *ex parte* special motion must be supported by an affidavit.² *Ex parte* special motions are not common.³ They are usually granted to prevent some irreparable injury to the moving party which would otherwise occur within the time limited for notice,

³ Rule 5.

⁴ Robinson v. Satterlee, 3 Saw. 134, 141.

⁵ United States v. Parrott, 1 McAll. 447.

⁶ Rule 2.

⁷ Rule 4.

§ 196. ¹ Daniell’s Ch. Pr. (2d Am. ed.)

1789; United States v. Parrott, 1 McAll. 447, 454.

² Daniell’s Ch. Pr. (2d Am. ed.) 1789.

³ McLean v. The Lafayette Bank, 3 McLean, 503; United States v. Parrott, 1 McAll. 447; Marshall v. Mellersh, 5 Beav. 496; Gray v. Chicago, Ia. & Neb. R. R. Co., 1 Woolw. 63.

when the same is required; and the court should always lend a willing ear to an application to discharge or set aside an *ex parte* order.⁴ Writs of *ne exeat republica* are usually granted *ex parte*.⁵ So are applications for extensions of time to plead, or take other proceedings in a cause. The equity rules provide that "whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction — either the common injunction or the special injunction — is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court."⁶ The Revised Statutes, however, make an exception to this rule, in providing that "whenever notice is given of a motion for an injunction out of a Circuit or District Court, the court or a judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."⁷ The rule was, moreover, thus construed by Mr. Justice Miller: "The justices of the Supreme Court have power to grant injunctions which do not expire by the commencement of the next succeeding term. To injunctions thus granted, the latter part of the rule applies, namely, — that they continue until dissolved by some other order of the court. To injunctions granted by the judges or the district courts, the other alternative of the disjunctive sentence applies, merely reiterating the provision of the statute, that they continue till the next term of the court, unless otherwise ordered by the court."⁸ *Ex parte* orders may be obtained at

⁴ Daniell's Ch. Pr. (2d Am. ed.) 1789, 1790; *Isnard v. Cazeaux*, 1 Paige (N. Y.), 39; *Hart v. Small*, 4 Paige (N. Y.), 551.

⁵ *Collinson v. —*, 18 Ves. 353; *Daniell's Ch. Pr.* (2d Am. ed.) 1789, 1937.

⁶ Rule 55. See also *Yuengling v. Johnson*, 1 Hughes, 607.

⁷ U. S. R. S. § 718.

⁸ *Gray v. Chicago, Ia. & Neb. R. R. Co.*, 1 Woolw. 63, 68.

any time and in any place within the jurisdiction of the judge, whether in court or elsewhere.⁹

§ 197. **Notice of Motion.** — The equity rules provide that “all motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.”¹ “Any judge of the Circuit Court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk’s office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the Circuit Court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.”² It has been held that the foregoing rule does not apply to a motion made in term and in the presence of counsel for the opposing side.³ “Except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings, entered in such order-book, touching any and all matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city, the judges of the Circuit Court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.”⁴ This subject is usually regulated

⁹ Daniell’s Ch. Pr. (2d Am. ed.) 1789;
Rule 3.

³ McLean v. The Lafayette Bank, 3
McLean, 503, 505.

§ 197. ¹ Rule 6.

⁴ Rule 4.

² Rule 3.

by rule or local practice differently in the several circuits. In the Circuit Court for the Southern District of New York, four days' notice personally served, together with a copy of the bill and of the affidavits intended to be used in support of the motion, is all that is usually required.⁵

All notices of motion for any process of contempt or commitment must be served personally on the party against whom the process is sought,⁶ except, perhaps, when an order for substituted service has been previously obtained.⁷ In England, under special circumstances, notice of a motion could be made upon an agent of a person without the jurisdiction.⁸

A notice of motion should be properly entitled in the cause or matter in which it is made.⁹ It should be addressed to the solicitor of the party intended to be affected by it, or to the party himself when he appears in person or personal service is intended. It should be dated,¹⁰ and signed by the solicitor for the moving party, or by that party himself if he appear in person.¹¹ It has been held in New York that a notice signed in person by a defendant who has previously appeared by a solicitor who has not been removed is irregular.¹² A notice of motion should state the day, place, and hour at which the motion will be made.¹³ It is usual, however, to designate the hour by the expression "at the opening of the court on that day," and to add the words "or as soon thereafter as counsel can be heard."¹⁴ Where the motion can be made only by leave of the court, the notice ought to mention that it is so made; or, otherwise, it seems that it may be disregarded.¹⁵ Where the object of the motion is to discharge an

⁵ See Rule 105 of the Rules of the U. S. C. C. for the Southern District of New York.

⁶ Daniell's Ch. Pr. (2d Am. ed.) 1794; Gray v. Chicago, Ia. & Neb. R. R. Co., 1 Woolw. 63.

⁷ Hope v. Hope, 4 De G., M. & G. 328.

⁸ Daniell's Ch. Pr. (2d Am. ed.) 1794; Hope v. Hope, 4 De G., M. & G. 328; Cooper v. Wood, 5 Beav. 391; Pulteney v. Shelton, 5 Ves. 147; Hunt v. Lever, 5 Ves. 147; and § 96.

⁹ Barbour's Ch. Pr. 570; Rowlatt v. Cattell, 2 Hare, 186; Salomon v. Stalman, 4 Beav. 243; Davis v. Barrett, 7 Beav. 171; Morrall v. Prichard, 11 Jur. (N. S.) 969.

¹⁰ Barbour's Ch. Pr. 570; Moody v. Hebbard, 11 Jur. 941; Hutchinson v. Horner, 9 Jur. 615; Parker v. Francis, 9 Jur. 616, note.

¹¹ Barbour's Ch. Pr. 570; Perry v. Walker, 4 Beav. 452.

¹² Halsey v. Carter, 6 Robertson (N. Y.), 535; Webb v. Dill, 18 Abb. Pr. (N. Y.) 264.

¹³ Barbour's Ch. Pr. 570; Bodwell v. Willcox, 2 Caines (N. Y.), 104; Anon., 1 J. R. (N. Y.) 143.

¹⁴ Barbour's Ch. Pr. 570; *In re Electric Tel. Co. of Ireland*, 10 W. R. 4.

¹⁵ Hill v. Rimell, 8 Simons, 632; Jacklin v. Wilkins, 6 Beav. 607.

order for irregularity, it is usual for the notice to state the ground of the application.¹⁶ It is usual for the notice also to state before what judge the motion will be made; and to specify the affidavits and other documents which will be used in its support.¹⁷ The notice must state clearly the terms of the order which will be asked for, and everything which the party would have should be expressed; as the court will not extend the order beyond the notice.¹⁸ For this reason, it is usual to add a notice of a motion for general relief; that is, "for such other or further order or relief as to the court shall seem just;" under which, other relief germane to that, a motion for which has been specifically noticed, may be granted.¹⁹ A general appearance and consent to an adjournment waives a defect in a notice of motion.²⁰ It has been held that on the hearing of a motion for the production of papers under a subpœna *duces tecum* coupled with a prayer for general relief, if the other party appears by counsel, an order may be granted committing him, or, if a corporation, committing its officers, for contempt for disobedience to the subpœna.²¹ It has been held that a motion for the appointment of a receiver cannot be made at the hearing, upon a motion for an injunction against an interference with a railroad claimed to be in the possession of the moving party.²² "A motion to suppress depositions brings up the regularity of an *ex parte* order directing them to be taken, as well as the competency of the witnesses examined, if the party moving to suppress has never done anything to waive the objection."²³

A motion may be made by any party to a cause except one who is in contempt.²⁴ A party in contempt cannot move for any other purpose than to discharge the contempt proceedings,²⁵ or to expunge scandal from the record.²⁶ And it has been said that, in such cases, he should apply by petition.²⁷ No one should join

¹⁶ *Brown v. Robertson*, 2 Phil. 173; *Alexander v. Esten*, 1 Caines (N. Y.), 152;

¹⁷ *Daniell's Ch. Pr.* (2d Am. ed.) 1793;

¹⁸ *Clement v. Griffith*, C. P. Coop. 470,

¹⁹ *Brown v. Ricketts*, 2 J. Ch. (N. Y.) 425.

²⁰ *Barbour's Ch. Pr.* 570; *Mann v. King*, 18 Ves. 297.

²¹ *Barbour's Ch. Pr.* 570.

²² *Marye v. Strouse*, 6 Sawyer, 204.

²³ *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 44 Fed. R. 294, 300.

²⁴ *St. L. K. C. & C. Ry. Co. v. Dewees*, 23 Fed. R. 691.

²⁵ *Mr. Justice Bradley in Eslava v. Mazange*, 1 Woods, 623, 627.

²⁶ *Daniell's Ch. Pr.* (2d Am. ed.) 1787; *Nicholson v. Squire*, 16 Ves. 259, 260.

²⁷ *Daniell's Ch. Pr.* (2d Am. ed.) 554-558, 1787; *Anon.*, 5 Ves. 656.

²⁸ *Everett v. Prythergch*, 12 Simons, 363.

²⁹ *Lord Eldon in Nicholson v. Squire*, 16 Ves. 259, 260.

in a notice for a motion in which he is not directly interested.²⁸ The joinder of one disinterested party with others who had an interest was held in England a sufficient reason for refusing the whole motion.²⁹ A motion in the course of proceedings under an information cannot be made on behalf of the relators, but only on behalf of the attorney-general or district attorney.³⁰ Where it is clearly for the interest of a person under a disability to make a motion, and he has no next friend, or his next friend refuses to do so, a next friend for the purposes of the application may move on his behalf.³¹

A number of objects not inconsistent with each other, and even inconsistent objects, if prayed for in the alternative, may be included in the same notice and motion.³² The court will discourage when directing as to costs the making of separate motions for objects which might have been conveniently obtained by a single application.³³

§ 198. **Argument of Motions.** — The manner of bringing motions to a hearing is regulated by local rule or usage differently in the different circuits. Lord Campbell has thus described the former English practice, which was abolished by Lord Mansfield, whose rules for the hearing of motions at common law were followed by the Court of Chancery: “Day by day during the term, each counsel when called upon had been accustomed to make as many motions successively and continuously as he pleased. The consequence was, that by the time the Attorney and Solicitor-General, and two or three other Dons, had exhausted their motions, the hour had arrived for the adjournment; and as the counsel of highest rank was again called to at the sitting of the court next morning, juniors had no opportunity of making any motions with which they might be intrusted till the last day of term, when it was usual, as a fruitless compliment to them, to begin with the back row, — after the time had passed by when their motions could be made with any benefit to their clients. The consequence was, that young men of promise were unduly depressed, and more briefs were brought to the leaders than there

²⁸ Daniell's Ch. Pr. (2d Am. ed.) 1793; Folland v. Lamotte, 10 Simons, 486.

²⁹ Folland v. Lamotte, 10 Simons, 486.

³⁰ Attorney-General v. Wright, 3 Beav. 447.

³¹ Cox v. Wright, 9 Jur. (n. s.) 981;

Guy v. Guy, 2 Beav. 460; Furtado v. Furtado, 6 Jur. 227.

³² Daniell's Ch. Pr. (2d Am. ed.) 1792, 1793.

³³ Hawke v. Kemp, 3 Beav. 288.

was time for them to read, even had they been toiling all night at their chambers instead of sitting up in the House of Commons, absorbed in party struggles. Thus the interests of the suitors were in danger of being neglected, and the judges did not receive the fair assistance from the bar in coming to a right conclusion which they were entitled to expect. To remedy these evils, a rule was made that the counsel should only make one motion a-piece in rotation; and that if by chance the court rose before the whole bar had been gone through, the motion should begin next morning with him whose turn it was to move at the adjournment. The business was thus both more equally distributed and much better done.”¹ This custom, however, if it ever did prevail, was early abolished in this country; and here usually either no method is observed, and motions are made by counsel as they catch the judge's eye, or a calendar upon which motions are placed by the clerk in the order in which they were first brought to his attention, is made and called. In the Supreme Court of the United States the Attorney-General and the Solicitor-General take precedence.

When, at the hearing of a motion, the opposite party is not represented, proof of service must be shown by entry in the order-book, affidavit, or admission; and the hearing may then proceed *ex parte*.² When the moving party does not then appear, his motion will be dismissed. When both sides are represented, the moving party has the right of opening and replying.³ The English rule was that, “in injunction cases, where upon an order to dissolve an injunction *nisi* the plaintiff shows cause upon the merits confessed in the answer; then no reply is allowed, the motion for the order *nisi* being considered as the application, to which the plaintiff answers by showing cause upon the merits; after this, the defendant's counsel is allowed to argue against the cause shown by the plaintiff, and this is considered as the reply.”⁴ As a general rule, no person can be heard in support of a motion unless he has been one of the parties who gave notice of it.⁵ But when the object of a motion is to reverse the conclusion of a master, it seems that all persons

§ 198. ¹ Campbell's Lives of the Chief Justices, ch. xxxiv pp. 398-399. See also Daniell's Ch. Pr. (2d Am. ed.) 1797.

² Rule 6.

³ Daniell's Ch. Pr. (2d Am. ed.) 1799.

⁴ Daniell's Ch. Pr. (2d Am. ed.) 1799.

⁵ Stubbs v. Sargon, 3 Beav. 498, Daniell's Ch. Pr. (2d Am. ed.) 1793.

interested in the master's report are entitled to be heard in its support.⁶ At the hearing, if the English practice should be followed, any affidavit might be read by either party that had been filed in the clerk's office before the hearing. If an affidavit were filed too late for the other side to take a copy of it, or to obtain an affidavit controverting facts stated in it, that was a ground for moving to postpone the hearing. No affidavit filed previous to the entry of the motion could be used by the moving party, unless he had in his notice of motion stated specifically that he intended to use it. A separate notice to that effect, if served a reasonable time before the hearing of the motion, would, however, probably be sufficient.⁷ This subject is, however, by local rule or custom regulated differently in the different circuits. Where an order is made by which a particular act is to be done, unless the other party shall within, or rather, as is the usual American custom, at a certain time, show cause to the contrary; which order is called in England an order *nisi*, in the United States usually an order to show cause; the party obtaining it must, on the return-day, move for another order "to confirm the previous order *nisi* absolute." The motion, in this case, requires no notice, but the application must be supported by an affidavit to prove due service of the order *nisi*, similar to the proof of service of a notice of motion, unless a different mode or time of service be directed by the judge granting it.⁸ By rule, in the Circuit Court for the Southern District of New York, "all special motions, in reference to matters of practice, may be made in open court, or before a judge at chambers."⁹

§ 199. **Petitions in General.** — A petition is a request in writing directed to the judge or judges of the court, and showing some matter or cause whereupon the petition prays some direction or order.¹ It may be made by one who is, or by one who is not, a party to a cause pending in the court. Lord Erskine said formerly: "I do not find that there are any precise or positive boundaries between motions and petitions, as they are to be applied to carry into effect decrees and orders, so as to exclude all discretion in the court to grant or refuse them, accord-

⁶ Johnston v. Todd, 5 Beav. 394; Daniell's Ch. Pr. (2d Am. ed.) 1793.

⁷ Daniell's Ch. Pr. (2d Am. ed.) 1797, 1798.

⁸ Daniell's Ch. Pr. (5th Am. ed.) 1593.

⁹ U. S. C. C., S. D. N. Y. Rule 111.

§ 199. ¹ 2 Barbour's Ch. Pr. 579.

ing to circumstances; but, generally speaking, motions which have for their object the giving effect to decrees or orders, should be confined to cases where the order which is to be made upon the motion arises out of recent proceedings upon which there is no doubt: for as the adverse party knows nothing but by the notice, containing only the name of the cause and what is prayed of the court, the proceedings ought to be recent and notorious, so as that the adverse party may be supposed to be perfectly conversant of all the steps and proceedings in the cause, as much as if, at a greater expense, they were recited in the petition."² But petitions are now rarely filed by a party to a cause, since any relief which he desires can usually be obtained equally well by a motion supported by an affidavit containing the allegations which would be necessary in a petition. Petitions are usually filed by some person not a party in order to obtain the benefit of proceedings in a cause pending in the court, or else to obtain an order in relation to some matter which is not the subject of any litigation in it. Petitions which are made in a cause are termed cause petitions.³ The most common instances of cause petitions are petitions for the appointment of a next friend, petitions of intervention, petitions for payment out of a fund in the hands of an officer of the court, and petitions for leave to sue a receiver. The most common instances of petitions which are not cause petitions are petitions for the appointment, removal, or resignation of a trustee, and petitions for the appointment of the guardian of an infant, and the maintenance of the infant out of his property. But in most, if not all, of these cases the application can also be made by motion, unless a long statement of facts is needed to show the right of the applicant to relief.⁴ After a decree which purports to finally dispose of the suit, one plaintiff cannot obtain relief against another by means of a petition setting up matters which could not have been introduced by an amended or supplemental bill; at least without notice to the party against whom he seeks relief.⁵ Ordinarily, a petition cannot be presented in a cause before the bill has been filed.⁶ A petition for leave to sue *in forma pauperis*

² Lord Shipbrooke *v.* Lord Hinchinbrook, 13 Ves. 387, 393. See, however, *Nicholson v. Squire*, 16 Ves. 259, 260.

³ *Daniell's Ch. Pr.* (2d Am. ed.) 1801.

⁴ *Jones v. Roberts*, 12 Simons, 189; *Barker v. Todd*, 15 Fed. R. 265.

⁵ *Smith v. Woolfolk*, 115 U. S. 143.

⁶ *Daniell's Ch. Pr.* (2d Am. ed.) 1801.

is an exception to this rule; and in an extraordinary case a stay-order might perhaps be granted upon a petition before the filing of a bill.⁷ The objection that a party who has proceeded by a petition should have filed a cross-bill, a supplemental bill, or a supplemental answer, is too late when not taken till after an answer to the petition and a decree thereupon.⁸

§ 200. **Petitions for Leave to Sue in forma pauperis.** — “The right to sue *in forma pauperis* originated in the statute of Hen. VII. This and the subsequent statute of Hen. VIII. are confined to actions in the courts of common law, and do not extend to defendants. The courts of equity have adopted the principle of these statutes, and proceeding further, have extended the relief to the case of defendants.”¹ An infant may sue or defend in this manner² in equity, but, unless so authorized by State statute, not at common law.³ In the Southern District of New York, it has been held that a non-resident may sue *in forma pauperis* at common law.⁴ A party may take an appeal⁵ to the Supreme Court, or sue out a writ of *habeas corpus*⁶ there *in forma pauperis*. A person suing or being sued in a representative capacity could not obtain an order of this character.⁷ According to the English practice, the person desiring permission to sue or defend *in forma pauperis* was obliged to present a petition to the Master of the Rolls, containing a short statement of his case or defense, and of the proceedings, if any, which had been had in the cause, and praying to be admitted to sue *in forma pauperis*, and that a counsel and solicitor might be assigned to him.⁸ The petition, when filed by a complainant, had to be accompanied by a certificate signed by counsel “that he conceives the plaintiff has just cause to be relieved touching the matter of the petition for which he has exhibited his bill;” and in all cases by the affidavit of the party himself “that he is not worth in all the world the sum of

⁷ Mayor of London *v.* Bolt, 5 Ves. 129; Daniell's Ch. Pr. (2d Am. ed.) 1801.

⁸ Kelsey *v.* Hobby, 16 Pet. 269, 277; Coburn *v.* Cedar Valley Coal & Land Co., 138 U. S. 196, 222.

§ 200. ¹ Lord Lyndhurst in Oldfield *v.* Cobbett, 1 Phil. 613, 615. See Ferguson *v.* Dent, 15 Fed. R. 771.

² Ferguson *v.* Dent, 15 Fed. R. 771.

³ Roy *v.* Louisville, N. O. & T. R. Co., 34 Fed. R. 276.

⁴ Heckman *v.* Mackey, 32 Fed. R. 574.

⁵ See *In re* Mills, 135 U. S. 263.

⁶ *In re* Mills, 135 U. S. 263.

⁷ Oldfield *v.* Cobbett, 1 Phil. 612; Daniell's Ch. Pr. (2d Am. ed.) 44; Anon., 1 Ves. Jr. 409. But see Thompson *v.* Thompson, cited in 1 Turner & V. Chan. Pr. 513; Ferguson *v.* Dent, 15 Fed. R. 771.

⁸ Daniell's Ch. Pr. (2d Am. ed.) 46.

5l. after payment of his just debts, his wearing apparel and the matters in question in the cause only excepted.”⁹ When the petition was approved, the Master of the Rolls underwrote an order admitting the petitioner to sue or defend *in forma pauperis*, and assigned a counsel and solicitor to act on his behalf.¹⁰ Such counsel or solicitor could not refuse so to act unless excused by the court for a sufficient reason.¹¹ They could not take any fee, profit, or reward of the pauper for the despatch of business, while the cause was pending and the party continued *in forma pauperis*, except paupers’ fees, which were twopence a sheet for the labor of copying.¹² Nor could any agreement be made for the payment of any recompense afterwards.¹³ For an offence in either of these respects, both the lawyer and the client were guilty of contempt of court; and the client was dispaupered, and forever disqualified from suing as a pauper in the same suit.¹⁴ When it was made to appear to the court that a pauper had sold or contracted for the benefit of his suit, or any part thereof, while the same was depending, his suit was dismissed absolutely.¹⁵ No fees except paupers’ fees could be collected from the pauper, nor could costs be decreed against him,¹⁶ except for scandal.¹⁷ In case of success, however, the court might allow him full costs. “For though he is at no costs, or but small expense, yet the counsel and clerks do not give their labor to the defendant, but to the pauper.”¹⁸ The order permitting a party to sue or defend *in forma pauperis* had to be served upon the opposite party as soon as possible. For the pauper was liable for all costs decreed against him before the service of the order.¹⁹ A party could be dispaupered for improper or vexatious conduct in the suit.²⁰

§ 201. *Petitions of Intervention.* — A petition of intervention is filed in a pending cause by a person who is not a party to it; and prays permission to intervene and become a party, either

⁹ Daniell’s Ch. Pr. (2d Am. ed.) 46; Wilkinson v. Belsher, 2 Brown Ch. C. 272.

¹⁰ Daniell’s Ch. Pr. (2d Am. ed.) 47.

¹¹ Daniell’s Ch. Pr. (2d Am. ed.) 47, 48.

¹² Daniell’s Ch. Pr. (2d Am. ed.) 47.

¹³ Daniell’s Ch. Pr. (2d Am. ed.) 47.

¹⁴ Daniell’s Ch. Pr. (2d Am. ed.) 47.

¹⁵ Daniell’s Ch. Pr. (2d Am. ed.) 47.

¹⁶ Daniell’s Ch. Pr. (2d Am. ed.) 49;

Scatchmer v. Foulkard, 1 Eq. Cases Abr. 125.

¹⁷ Rattray v. George, 16 Ves. 232. See also Murphy v. Oldis, 2 Molloy, 475; Richardson v. Richardson, 5 Paige (N. Y.) 58.

¹⁸ Scatchmer v. Foulkard, 1 Eq. Cases Abr. 125; Rattray v. George, 16 Ves. 232; Daniell’s Ch. Pr. (2d Am. ed.) 49, 50.

¹⁹ Ballard v. Catling, 2 Keen, 606.

²⁰ Wagner v. Mears, 3 Simons, 127.

plaintiff or defendant. The general rule is that the court has no power to allow a stranger to a cause "to be heard therein either by petition or motion, except in certain cases arising from necessity, as where the pleadings contain scandal against a stranger, or where a stranger purchases the subject of litigation pending the suit, and the like."¹ In a suit brought by a member of a class on behalf of himself and others similarly interested, another member of the class who desires the success of the complainant² can always intervene,³ even after a decree for a sale, provided there has been no distribution of the assets,⁴ upon payment of his share of the costs, expenses, and reasonable counsel fees which have been previously paid or incurred.⁵ Ordinarily, such a person will be joined as plaintiff. If he is citizen of the same State as one of the defendants, that will not in most, if in any cases, deprive the court of jurisdiction.⁶ If there should be any danger that it would, he may be joined as a defendant.⁷ If he intends to act in hostility to the original complainant, the court may, in its discretion, add him to the defendants.⁸

In suits brought by or against a trustee, or otherwise affecting trust property, the beneficiaries of the trust, such as trustholders, will frequently be allowed to intervene for the purpose of protecting their interests;⁹ but ordinarily the right to intervene will be denied them in the absence of fraud, neglect, inability, collusion, or bad faith by the trustee.¹⁰ In suits brought by or

§ 201. ¹ Mr. Justice Bradley in *Anderson v. Jacksonville, P. & M. R. R. Co.*, 2 Woods, 628, 629. See also *Searles v. Jacksonville, P. & M. R. R. Co.*, 2 Woods, 621, 625; *Shields v. Barrow*, 17 How. 130, 145; *Bronson v. Railroad Co.*, 2 Black, 524; *Coleman v. Martin*, 6 Blatchf. 119; *Drake v. Goodridge*, 6 Blatchf. 151; *Page v. Holmes Burglar Alarm Tel. Co.*, 18 Blatchf. 118.

² *Forbes v. Memphis, El Paso & Pacific R. Co.*, 2 Woods, 323.

³ *Ogilvie v. Knox Ins. Co.*, 2 Black, 539; s. c. 22 How. 380; *Myers v. Fenn*, 5 Wall. 205; *Ex parte Jordan*, 94 U. S. 248; *First Nat. Ins. Co. v. Salisbury*, 130 Mass. 303; *Hallett v. Hallett*, 2 Paige (N. Y.), 432; *Leigh v. Thomas*, 2 Ves. Sen. 312; *Story's Eq. Pl.* § 99.

⁴ *George v. St. Louis Cable & W. Ry. Co.*, 44 Fed. R. 117.

⁵ *Central Railroad v. Pettus*, 113 U. S. 116; *Trustees v. Greenough*, 105 U. S. 527.

⁶ *Stewart v. Dunham*, 115 U. S. 61.

⁷ *Brown v. Pacific Mail S. S. Co.*, 5 Blatchf. 525, 535.

⁸ *Galveston R. R. v. Cowdrey*, 11 Wall. 459, 478; *Forbes v. Memphis, El Paso & Pacific R. R. Co.*, 2 Woods, 323.

⁹ *Williams v. Morgan*, 111 U. S. 684; *Drew v. Harman*, 5 Price, 319; *Saylors v. Saylors*, 3 Heisk. (Tenn.) 525; *Birdsong v. Birdsong*, 2 Head (Tenn.), 289; *Carter v. New Orleans*, 19 Fed. R. 659; *F. L. & Tr. Co. v. Mo. I. & N. Ry. Co.*, 21 Fed. R. 264.

¹⁰ *Richards v. Chesapeake & O. R. R. Co.*, 1 Hughes, 28, 36; *Skiddy v. Atlantic M. & O. R. R. Co.*, 3 Hughes, 320, 350-352; *per* Bond, J., Hughes, J., dissenting.

against a corporation, stockholders may be allowed to intervene if there is any danger of their being injured by fraud, neglect, or collusion on the part of the officers;¹¹ and in some such cases stockholders have been allowed to file an answer and defend the suit in the name of the corporation.¹² In the absence of fraud, neglect, or collusion by the officers of the corporation, stockholders will not be allowed to intervene before a decree.¹³ New parties can always intervene by the consent of the original parties.¹⁴ Persons interested in disputing the validity of a patent have been allowed to move to set aside a decree recognizing the validity of the patent entered by collusion in a suit to which they were strangers.¹⁵ But such persons were not allowed to intervene in a suit to restrain the infringement of a patent when they relied upon a distinct defense not raised therein.¹⁶

A person claiming a right to share in a fund in court, or claiming the title to property in the hands of a receiver, is usually allowed to intervene *pro interesse suo*.¹⁷ A party claiming the equitable title to land held by a railway company of which the receiver had not taken possession, and which was exempted from the receivership by order, and not otherwise mentioned in the proceedings, was denied leave to intervene in a suit to foreclose a mortgage on the property of the railroad.¹⁸ The Attorney-General of the United States may intervene for the protection of the Federal government in a suit between two States affecting their boundaries.¹⁹

A petition for leave to intervene should describe the proceedings in the cause in which it is filed, so that the court can see the nature and condition of the suit.²⁰ It may also contain a

¹¹ Bayliss v. Lafayette, M. & B. R. Ry. Co., 8 Biss. 193.

¹² Bronson v. La Crosse & M. R. R. Co., 2 Wall. 283.

¹³ Forbes v. Memphis E. P. & P. R. R. Co., 2 Woods, 323, 333. For a peculiar case, see Coffin v. Chattanooga Water & Power Co., 44 Fed. 535.

¹⁴ Galveston Railroad v. Cowdrey, 11 Wall. 459, 461; French v. Gapen, 105 U. S. 509, 525.

¹⁵ Barker v. Todd, 15 Fed. R. 265. But see Washburn & Moen Manuf. Co. v. Colwell Steel Bath Furnace Co., 1 Fed. R. 225; Cochran v. Deener, 95 U. S. 355.

¹⁶ Page v. Holmes Burglar Alarm Tel. Co., 18 Blatchf. 118; § c. 2 Fed. R. 330; Cochran v. Deener, 95 U. S. 355; Thomas H. El. Co. v. Sperry Co., 46 Fed. R. 75.

¹⁷ See Lord Pelham v. Duchess of Newcastle, 3 Swanston, 290; Daniell's Ch. (2d Am. ed.) 1263, 1270.

¹⁸ Cutting v. Florida Ry. & Nav. Co., 45 Fed. R. 441.

¹⁹ Florida v. Georgia, 17 How. 478; *supra*, § 11.

²⁰ Ransom v. Davis' Adm'rs, 18 How. 295.

statement of the petitioner's view of the case, and pray in addition to intervention the final relief which he desires.²¹ A paper termed a cross-bill, if otherwise correct in form, may be sustained as a petition of intervention.²² If any of the original parties desires to contest the petitioner's right to intervene, he must do so specifically at the hearing upon the petition.²³ Leave to intervene when granted should be given by order; ²⁴ but by proceeding without objection an omission to enter such an order will be waived.²⁵ After intervention the new parties are treated to all intents and purposes as if they had been original parties to the suit.²⁶ Their citizenship, if the suit is pending in a Federal court at the time of their intervention, does not affect the jurisdiction.²⁷ If the suit is then pending in a State court, in a proper case they may remove it.²⁸ They have the right to appeal from the final decree, and can then object to all interlocutory proceedings taken after their intervention.²⁹

§ 202. **Form of Petitions and Practice upon Them.** — A petition should be properly entitled in the cause in which it is presented.¹ When not a cause petition, a petition is entitled "In the matter of the application of," &c. The petitioner, if not a party to a cause in which the petition is filed, should state his name, residence, and description.² A petition should contain no scandal or impertinence; for which, like any other proceeding, it may be referred.³ A petition need not be signed by counsel unless it seeks a rehearing or an appeal.⁴ Petitions are usually signed by the party making them, either personally or by his solicitor.⁵

"Petitions are either for orders of course, or for special orders. Petitions for orders of course are forthwith granted, without any attendance being ordered; if they are for special matters a day is appointed for hearing them. Most things which may be moved for of course, may also be obtained, as of course, upon petition."⁶

²¹ French v. Gapen, 105 U. S. 509, 519, 520.

²² French v. Gapen, 105 U. S. 509, 519.

²³ French v. Gapen, 105 U. S. 509, 525; Myers v. Fenn, 5 Wall. 205.

²⁴ For the form of an order, see *Ex parte* Jordan, 94 U. S. 248, 249.

²⁵ Myers v. Fenn, 5 Wall. 205.

²⁶ French v. Gapen, 105 U. S. 509, 525.

²⁷ Krippendorf v. Hyde, 110 U. S. 276, 283-284.

²⁸ Hack v. Chicago & G. S. Ry. Co., 23

Fed. R. 356. But see Iowa Homestead Co. v. Des Moines Nav. & R. R. Co., 8 Fed. R. 97.

²⁹ *Ex parte* Jordan, 94 U. S. 248, 252; Williams v. Morgan, 111 U. S. 684.

§ 202. ¹ Daniell's Ch. Pr. (2d Am. ed.) 1802.

² Glazbrook v. Gillatt, 9 Beav. 492.

³ Daniell's Ch. Pr. (2d Am. ed.) 1803.

⁴ Daniell's Ch. Pr. (2d Am. ed.) 1803.

⁵ Daniell's Ch. Pr. (2d Am. ed.) 1803.

⁶ Daniell's Ch. Pr. (2d Am. ed.) 1802.

All petitions which are for matters not granted as of course must be served upon all parties interested in the matter prayed for in them. Service is made substantially in the same way and at the same time before the hearing as that of notices of motions.⁷ If actual, and not constructive, service is required, it seems that it must be made by delivering a copy of the petition, and at the same time showing the original to the person served,⁸ unless the court otherwise directs.

Objections to the form of a petition can only be taken by demurrer.⁹ By answering a respondent loses his right to demur,¹⁰ and, it has been held, waives the objections that the petitioner had a complete and adequate remedy at law,¹¹ that he should have proceeded by bill instead of by petition;¹² and, if a receiver, that he has not obtained leave to sue.¹³ Adverse parties may file answers denying the facts stated in a petition, or setting up other facts in avoidance. Such answers should be verified by affidavit.¹⁴ If the parties are at issue as to the facts, according to the more formal practice testimony may be taken as in the regular course of a suit;¹⁵ but the more usual course is for the parties on either side to support their claim by affidavits, in the same manner as when supporting or opposing a motion.¹⁶ Proceedings upon the hearing of petitions are similar to those upon the hearing of motions.¹⁷ It has been said by Daniell that a petition cannot be amended by adding to it a statement of facts which have occurred since it was filed:¹⁸ but an English judge has held otherwise.¹⁹

§ 203. **Orders.** — An order is a direction of the court or a judge thereof in writing. When contained in a decree, an order is termed a decretal order.¹ Orders may be made at any place within the territorial jurisdiction of the court; and in a Circuit Court, if all judges authorized to sit therein are absent from the circuit, it seems that they may be made by a justice of the

⁷ See Rules 5 & 6; Daniell's Ch. Pr. 2d Am. ed. 1804.

⁸ Daniell's Ch. Pr. (2d Am. ed.) 1804.

⁹ U. S. R. S. § 954, *Newman v. Moody*, 19 Fed. R. 858.

¹⁰ *Newman v. Moody*, 19 Fed. R. 858.

¹¹ *Newman v. Moody*, 19 Fed. R. 858.

¹² *Newman v. Moody*, 19 Fed. R. 858.

¹³ *Newman v. Moody*, 19 Fed. R. 858.

¹⁴ Mitford's & Tyler's Pl. 448.

¹⁵ Mitford's & Tyler's Pl. 448.

¹⁶ Daniell's Ch. Pr. (5th Am. ed.) 1608.

¹⁷ Daniell's Ch. Pr. (2d Am. ed.) 1805.

¹⁸ Daniell's Ch. Pr. (5th Am. ed.) 1610.

¹⁹ Malins, V. C. *In re Westbrook's Trusts*, L. R. 11 Eq. 252.

§ 203. ¹ U. S. R. S. § 719. See *Good-year Dental Vulcanite Co. v. Folsom*, 3 Fed. R. 509.

Supreme Court sitting anywhere within the United States.² It has been held, that when a district judge has, under the order of the circuit judge, tried a case in another district than his own, he may hear in his own district a motion for a new trial when the counsel for all parties waive his return to the district of the trial for the purpose of hearing and deciding the motion.³ Orders upon interlocutory applications should be served upon the solicitor of the opposite party. If the other party takes a step in the action after an *ex parte* order has been obtained but before its service, "that step being in itself regular, the order which had been obtained and not served cannot afterwards be acted upon, if it will interfere with the step so taken."⁴ If it is intended to enforce the order by contempt proceedings, it should be served personally upon the party to be affected by it,⁵ unless possibly in an extraordinary case an order should be granted allowing substituted service.⁶

Interlocutory orders made upon motion may be altered or vacated at any time;⁷ and orders made *ex parte* upon petition may also be discharged upon motion for irregularity.⁸ According to the English practice, orders made after a hearing upon a petition could not be altered or discharged without the filing of a petition for a rehearing, or upon appeal.⁹ A court has, during the term at which it is entered, the power to review and modify or set aside any order or decree, interlocutory or final.¹⁰ It has been held that even in a criminal case the court may *nunc pro tunc* at a term after final judgment enter an order correcting a clerical error *nunc pro tunc* as of the preceding term.¹¹ An order granted after a hearing before one judge of a court will, unless under extraordinary circumstances, not be modified or va-

² United States v. Louisville & P. Canal Co., 4 Dill. 601; Searles v. Jacksonville, P. & M. R. R. Co., 2 Woods, 621; U. S. R. S. § 719; 8 Ry. & Corp. L. J. 200.

³ Cheesman v. Hart, 42 Fed. R. 98, 105.

⁴ Daniell's Ch. Pr. (2d Am. ed.) 1789; Church v. Marsh, 2 Hare, 652.

⁵ *Re* Cary, 10 Fed. R. 622.

⁶ Hunter v. —, 6 Simons, 429; Lorton v. Seaman, 9 Paige, (N. Y.), 609; People v. Brower, 4 Paige (N. Y.), 405; Stafford v. Brown, 4 Paige (N. Y.), 360.

⁷ Daniel's Ch. Pr. (2d Am. ed.) 1616,

1807; Eslava v. Mazange, 1 Woods, 623, 627; Nelson v. Barker, 3 McLean, 379.

⁸ *In re* Marrow, Craig, & Ph. 142; Daniell's Ch. Pr. (2d Am. ed.) 1807.

⁹ Bishop v. Willis, 2 Ves. Sen. 113; *In re* Marrow, Craig & Ph. 142; Daniell's Ch. Pr. (2d Am. ed.) 1808. But see *In re* Dovenby Hospital, 1 Myl. & Cr. 279; West v. Smith, 3 Beav. 306.

¹⁰ Doss v. Tyack, 14 How. 297, 313; Basset v. United States, 9 Wall. 38, 41; Henderson v. Carbondale Coal & Coke Co., 140 U. S. 25, 40.

¹¹ *In re* Wight, 134 U. S. 136.

ated by another except upon appeal.¹² Unless limited by their terms, or, as in the case of injunctions granted by district judges, by statute,¹³ orders within the jurisdiction of the judge or court that grants them remain in force until discharged by a subsequent order;¹⁴ or until the final decree, when, unless renewed by its terms, all orders expire.¹⁵ Before the Evarts' Act, no appeal lay before the final decree from an interlocutory order which was not final in its nature.¹⁶ It has been said by Chief Justice Taney, that "In this respect the practice of the United States chancery courts differs from the English practice. For appeals to the House of Lords may be taken from an interlocutory order of the chancellor, which decides a right of property in dispute; and therefore there is no irreparable injury to the party by ordering his deed to be cancelled, or the property he holds to be delivered up, because he may immediately appeal, and the execution of the order is suspended until the decision of the appellate court. But the case is otherwise in the courts of the United States, where the right to appeal is by law limited to final decrees. And if by an interlocutory order or decree he is required to deliver up property which he claims, or to pay money which he denies to be due, and the order is immediately carried into execution by the Circuit Court, his right of appeal is of very little value to him, and he may be ruined before he is permitted to avail himself of the right. It is exceedingly important, therefore, that the Circuit Courts of the United States, in framing their interlocutory orders, and in carrying them into execution, should keep in view the difference between the right of appeal, as practised in the English chancery jurisdiction, and as restricted by the act of Congress, and abstain from changing unnecessarily the possession of property, or compelling the payment of money by an interlocutory order."¹⁷ By the Evarts' Act an appeal lies to the Circuit Court of Appeals from an interlocutory order or decree granting or continuing an injunction.¹⁸

§ 204. **Judges who may grant Orders.** — An order may be made by any judge authorized to sit in the court in which the cause is

¹² *Cole Silver Mining Co. v. Virginia & G. H. W. Co.*, 1 Saw. 685, 689; *Oglesby v. Atwell*, 14 Fed. R. 244.

¹³ U. S. R. S. § 719; *Gray v. Chicago, I. & N. R. R. Co.*, 1 Woolw. 63.

¹⁴ *Eslava v. Mazana*, 1 Woods, 623, 627.

¹⁵ *Gardner v. Gardner*, 87 N. Y. 14; *Daniell's Ch. Pr.* (2d Am. ed.) 1902.

¹⁶ See *infra*, Chapters on Writs of Error and Appeals.

¹⁷ *Forgay v. Conrad*, 6 How. 201, 205.

¹⁸ 26 St. at L. ch. 517, § 11, p. 829.

pending. In the Supreme Court it is the custom for each justice to refer to the full bench every application of importance which is made to him.¹ An order in a case pending in a Circuit Court may be made by the justice of the Supreme Court allotted to that circuit;² or by any justice of the Supreme Court requested, in writing, by the circuit justice to hold court in his circuit;³ or if there is no justice of the Supreme Court allotted to that circuit, by any justice of the Supreme Court requested by the Chief Justice to hold court there;⁴ by the circuit judge of that circuit;⁵ by the district judge of that district;⁶ or by any judge authorized to hold the District Court in that district;⁷ or by any two of those judges.⁸

There are nine circuits.⁹ The first circuit includes the districts of Rhode Island, Massachusetts, New Hampshire, and Maine.¹⁰ The second circuit includes the districts of Vermont, Connecticut, and New York.¹¹ The third circuit includes the districts of Pennsylvania, New Jersey, and Delaware.¹² The fourth circuit includes the districts of Maryland, Virginia, West Virginia, North Carolina, and South Carolina.¹³ The fifth circuit includes the districts of Georgia, Florida, Alabama, Mississippi, Louisiana, and Texas.¹⁴ The sixth circuit includes the districts of Ohio, Michigan, Kentucky, and Tennessee.¹⁵ The seventh circuit includes the districts of Indiana, Illinois, and Wisconsin.¹⁶ The eighth circuit includes the districts of Arkansas, Colorado, Nebraska, Minnesota, Iowa, Missouri, Kansas, North Dakota, South Dakota, and Wyoming,¹⁷ and the Territories of New Mexico, Oklahoma, and Utah.¹⁸ The ninth circuit includes the districts of California, Oregon, Nevada, Washington, Montana, and Idaho,¹⁹ and the Territories of Alaska and Arizona.²⁰

§ 204. ¹ *Spies v. Illinois*, 123 U. S. 131.

² U. S. R. S. §§ 605, 606, 609.

³ U. S. R. S. § 617. See *Supervisors v. Rogers*, 7 Wall. 175.

⁴ U. S. R. S. § 618.

⁵ U. S. R. S. § 609.

⁶ U. S. R. S. § 609.

⁷ U. S. R. S. §§ 591-603.

⁸ U. S. R. S. § 609.

⁹ U. S. R. S. § 604; *supra*, § 26.

¹⁰ U. S. R. S. § 604.

¹¹ U. S. R. S. § 604.

¹² U. S. R. S. § 604.

¹³ U. S. R. S. § 604.

¹⁴ U. S. R. S. § 604.

¹⁵ U. S. R. S. § 604.

¹⁶ U. S. R. S. § 604.

¹⁷ U. S. R. S. § 604; 25 St. at L. ch. 180, § 21; 26 St. at L. ch. 664, § 16, p. 225.

¹⁸ 26 St. at L. ch. 517, § 15, p. 830; 139 U. S. 707.

¹⁹ U. S. R. S. § 604; 25 St. at L. ch. 180, § 21; act of July 3, 1890; 26 St. at L. ch. 656, § 16, p. 217.

²⁰ 26 St. at L. ch. 517, § 15, p. 830.

An order in a case pending in a District Court may be made by the judge of that district; or, if such office is vacant, by the judge of any other district within the same State;²¹ in case of the disability of the district judge for that district, or such an accumulation or urgency of business as to make the public interest require his appointment, by any other district judge within the same circuit designated and appointed after a certificate, under the court's seal, by the clerk as to those facts, by the circuit justice or circuit judge of the circuit, or, if both of them are absent from the circuit and unable to make such designation and appointment, by the Chief Justice of the United States;²² in the District Court for the Northern District of New York, when the judge thereof is disabled and so notifies the judge of the Southern District of New York, by the latter judge;²³ in the District Court for the Southern District of New York, when the judge thereof is disabled and so notifies the judge of the Eastern District, by the latter judge;²⁴ in the same court, by the judge of the Eastern District of New York, whenever the judge of the Southern District deems it desirable on account of the pressure of public business that the former shall perform judicial duties in his district, and has entered an order to that effect;²⁵ in one of the District Courts of Florida, by the judge of the other district, in a place where a term of such court is regularly held, when the judge of the district has filed in the clerk's office a certificate stating that he is disabled to hold a term of court there, and requesting the judge of the other district to hold the same.²⁶ An order made by the district judge of another district in the same State who was not sitting nor designated to sit in the district where the suit was pending, the office of district judge of the latter district not being vacant, was held null and void.²⁷ An order signed by a judge after his successor has been appointed and he has received notice thereof is void.²⁸

²¹ U. S. R. S. 602; *American Loan & Trust Co. v. East & West R. Co.*, 40 Fed. R. 182.

²² U. S. R. S. §§ 591-596. The appointment should be filed in the clerk's office of the District, not of the Circuit Court, but a failure to file the same does not invalidate the judge's acts. *National Home of Disabled Volunteers v. Butler*, 33 Fed. R. 374.

²³ U. S. R. S. § 599.

²⁴ U. S. R. S. § 599.

²⁵ U. S. R. S. § 600.

²⁶ U. S. R. S. § 598.

²⁷ *American Loan & Trust Co. v. East & West R. Co.*, 40 Fed. R. 182.

²⁸ *U. S. v. Alexander*, 46 Fed. R. 728; *Norton v. Shelby County*, 118 U. S. 425. But see *Manning v. Weeks*, 139 U. S. 504; *Ball v. United States*, 140 U. S. 118.

CHAPTER XVI.

INJUNCTIONS.

§ 205. **Definition, Classification, and Objects of Injunctions.** — An injunction is a writ issued from a court of equity commanding a person to do an act or acts other than the payment to the complainant of a sum of money, or not to do an act or acts specified therein. According to the different aspects from which they are considered, injunctions are classified as judicial writs, and writs remedial: as mandatory and prohibitory; as provisional and perpetual; or as common and special. Before describing the different characteristics of each of these classes, it may be well to refer briefly to the different occasions for the issue of the writ. Injunctions may be obtained to enforce a trust or other purely equitable right, to compel obedience to a covenant or other contract affecting land, to compel the obedience of corporations to their charters, to prevent a multiplicity of suits, and generally to prevent an irreparable injury for which damages at law would be no adequate remedy, and also in cases in which they are expressly authorized by statute.

§ 206. **Injunctions to enforce Trusts and other purely Equitable Rights.** — As trusts and other purely equitable rights are not recognized in courts of law, equity will always interfere to protect them by injunction when they are threatened with infringement.¹ On this account an injunction may be obtained to prevent the revelation or use of a secret of manufacture by a workman who has learned it under an express or implied promise of secrecy, or one to whom such a person has disclosed it;² and to restrain the publication of lectures,³ manuscripts,⁴ or works of

§ 206. ¹ *Scott v. Becher*, 4 Price 346; *In re Chertsey Market*, 6 Price, 261; *Sloo v. Law*, 3 Blatchf. 459; *Draper v. Davis*, 104 U. S. 347; *Cowles v. Whitman*, 10 Conn. 121; *Bispham's Eq.* § 425; *Kerr on Injunctions*, 172, 173.

² *Yovatt v. Winyard*, 1 Jac. & Walk. 304; *Morison v. Moat*, 9 Hare, 241; *Pea-*

body v. Norfolk, 98 Mass. 452. But see *Newbery v. James*, 2 Meriv. 446.

³ *Abernethy v. Hutchinson*, 3 L. J. Ch. 209.

⁴ *Stapleton v. Foreign Vineyard Association*, 12 W. R. 976; *Scheile v. Brakell*, 11 W. R. 796. See, however, *Southey v. Sherwood*, 2 Meriv. 435.

art⁵ heard or obtained under an express or implied agreement not to publish or reproduce them. Whether or not the publication of private letters which have no value as literary productions can be restrained at the prayer of their writer, upon the ground that it would be a breach of an implied trust, is, under the authorities, an open question.⁶

§ 207. **Injunctions to restrain Corporations from violating their Charters.**—The charters of corporations are considered “in the light of contracts made by the legislature on behalf of every person interested in anything to be done under them.”¹ On account of the irreparable injury that would otherwise ensue, and in the case of corporations to whom the State’s right of eminent domain is delegated, because they are trustees,² the disobedience of a corporation to its charter may be restrained by injunction, either at the suit of the attorney-general³ of the State to which it owes its existence, or of any individual who suffers special injury thereby.⁴ This rule applies whether the act complained of has been forbidden expressly, or merely by implication as not included within the powers expressly given to the corporation and those which are necessary for their proper exercise.⁵ “It is,” said Lord Hatherley, “a principle of public policy that where Parliament has authorized a company to raise a large capital for a specified purpose, the privilege confers no right upon the company to employ their capital in competition with the general public upon speculations of a different character.”⁶ “It is because these companies, being armed with the power of raising large sums of money, if they were allowed to apply their funds to purposes other than those for which they were constituted, might acquire such a preponderating influence and command over some particular branch of trade or commerce,

¹ *Prince Albert v. Strange*, 1 Macn. & G. 25, 42.

² *Woolsey v. Judd*, 4 Duer (N. Y.), 379; and *Eyre v. Higbee*, 35 Barb. (N. Y.), 502, hold that they can; and Judge Story concurs in this view, in *Story’s Eq. Jur.* §§ 946–948. But the opposite view is maintained in *Gee v. Pritchard*, 2 Swanst. 402; *Wetmore v. Scovell*, 3 Edw. Ch. (N. Y.) 515; and *High on Injunctions*, § 1012.

§ 207. ¹ *Blakemore v. Glamorganshire Canal Navigation*, 1 Myl. & K. 154, 162.

² *McCoy v. Chicago, I. St. L. & C. R. R. Co.* 13 Fed. R. 3.

³ *Attorney-General v. Great Northern Ry. Co.*, 1 Dr. & Sm. 154; *Attorney-General v. Railroad Companies*, 35 Wis. 425. But see *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371.

⁴ *Bostock v. North Staffordshire Ry. Co.*, 3 Sm. & Giff. 283; *Colman v. The Eastern Counties Ry. Co.*, 10 Beav. 1.

⁵ *Attorney-General v. Great Northern Ry. Co.*, 1 Dr. & Sm. 154.

⁶ Cited in *Kerr on Injunctions*, p. 473.

as would enable them to drive the ordinary private trader from the field, and create in their own favor a practical monopoly, whereby the interests of the public would be most seriously injured."⁷ When the corporation violates its charter by refusing to perform an act thereby expressly or impliedly commanded, it has been held that the attorney-general cannot compel its obedience by a mandatory injunction, but should in such a case apply for a mandamus.⁸ A private individual suing to enjoin a corporation from violating its charter must show some special damage caused to himself by the breach.⁹ A shareholder in a company is considered to incur special damage by its diverting its funds to other purposes than its charter authorizes, and can obtain an injunction to restrain its so doing,¹⁰ even, it has been held, if he bought shares in the company for the very object of preventing it;¹¹ provided that he sues in good faith, and does not act as the mere puppet of a rival corporation;¹² and that the suit is not brought "against the corporation and other parties, founded on rights which may properly be asserted by the corporation."¹³ The holder of a security for an indebtedness of a corporation is also, it seems, entitled to an injunction in a similar case;¹⁴ but not an unsecured creditor,¹⁵ except under very extraordinary circumstances.¹⁶ One whose land has been taken from him for the use of a corporation by the exercise of the State's right of eminent domain can obtain an injunction to restrain the use of the land for any other purpose than is allowed by the company's charter,¹⁷ provided at least that he can show that he is thereby injured.¹⁸ It is, however, no proper

⁷ Attorney-General v. Great Northern Ry. Co., 1 Dr. & Sm. 154, 159, 160.

⁸ Attorney-General v. Birmingham & Oxford Junction Ry. Co., 15 Jur. 1024; The People v. The Albany & Vt. R. R. Co., 24 N. Y. 261.

⁹ Chamberlaine v. Chester & B. Ry. Co., 1 Exch. 869, 877; Railroad Co. v. Ellerman, 105 U. S. 166, 173, 174.

¹⁰ Colman v. The Eastern Counties Ry. Co., 10 Beav. 1.

¹¹ Colman v. The Eastern Counties Ry. Co., 10 Beav. 1; Attorney-General v. Great Northern Ry. Co., 1 Dr. & Sm. 154; Bloxam v. Met. Ry. Co., L. R. 3 Ch. 337.

¹² Forrest v. Manchester, S. & L. Ry. Co., 4 De G. F. & J. 126; Filder v. Lon-

don, B. & S. C. Ry. 1 H. & M. 489; Robson v. Dodds, L. R. 8 Eq. 301; Rogers v. Oxford, Worcester, & Wolverhampton Ry. Co., 2 De G. & J. 662.

¹³ Rule 94; Hawes v. Oakland, 104 U. S. 450. See *supra*, §§ 12, 76, 87.

¹⁴ Bagshaw v. Eastern Union Ry. Co., 2 Macn. & G. 389; Herrick v. Grand Trunk Ry. Co., 7 Up. Canada Law Journal, 240.

¹⁵ Syers v. Brighton Brewery Co., 11 L. T. (N. S.) 560; Mills v. Northern Ry. of Buenos Ayres Co., 23 L. T. (N. S.) 719.

¹⁶ Evans v. Coventry, 5 De G. M. & G. 911.

¹⁷ Bostock v. North Staffordshire Ry. Co., 3 Sm. & Giff. 283.

¹⁸ East & West India Docks & Birmingham Junction Ry. Co. v. Dawes, 11 Hare,

ground for complaint by an individual that a corporation by exercising powers not conferred upon it by its charter enters into competition with him, and thereby diminishes the profits of his trade or calling.¹⁹ An English judge has said: "Where a statute prohibits the doing of a particular act affecting the public, no person has a right of action against another merely because he has done the prohibited act. It is incumbent on the party complaining to allege and prove, that the doing of the act prohibited has caused him some special damage, some peculiar injury, beyond that which he may be supposed to sustain in common with the rest of the Queen's subjects, by an infringement of the law. But where the act prohibited is obviously prohibited for the protection of a particular party, there it is not necessary to allege special damage."²⁰

§ 208. Injunctions to enforce the Specific Performance of Covenants and other Contracts affecting Land. — As no two pieces of land are exactly alike, equity considers that in no case can damages in money be adequate compensation for the breach of a covenant or other contract affecting land.¹ Accordingly, the specific performance of contracts for the purchase or sale of land and of covenants affecting the same, will be specifically enforced with the aid of an injunction, whenever they are mutual,² certain,³ not unconscionable;⁴ and their enforcement would be practicable.⁵ The rule concerning the enforcement of covenants affecting land has been thus stated: "If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction."⁶ This is, however, subject to the ex-

363; *Lee v. Milner*, 2 Y. & C. 611; *Ware v. Regents Canal Co.*, 3 De G. & J. 212.

¹⁹ *Railroad Co. v. Ellerman*, 105 U. S. 166, 173, 174.

²⁰ *Pollock, C. B.*, in *Chamberlaine v. Chester & B. Ry. Co.*, 1 Exchequer, 869, 877. See *Blakemore v. Glamorganshire Canal Navigation*, 1 Mylne & Keen, 154, 162.

§ 208. ¹ *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Bispham's Eq.* § 375.

² *Dorsey v. Packwood*, 12 How. 126; *Bispham's Eq.* § 377.

³ *Colson v. Thompson*, 3 Wheat. 336; *Bispham's Eq.* § 377.

⁴ *Surget v. Byers*, Hempst. 715; *Roundtree v. McLain*, Hempst. 245; *Miss. & Mo. R. R. Co. v. Cromwell*, 91 U. S. 643; *Bispham's Eq.* § 376. See *Randolph's Ex'r. v. Quidnick Company*, 135 U. S. 457.

⁵ *Ross v. Union Pacific R. R. Co.*, 1 Woolw. 26; *Fallon v. Railroad Co.*, 1 Dill. 121; *Texas & Pacific Ry. Co. v. Marshall*, 136 U. S. 393; *Bispham's Eq.* § 377.

⁶ *Vice Chancellor Wood in Tipping v. Eckersley*, 2 K. & J. 264. See also *Lord Manners v. Johnson*, L. R. 1 Ch. D. 673; *Lloyd v. London, Chatham, & Dover Ry. Co.*, 2 De G. J. & S. 568; *Trustees of Columbia College v. Lynch*, 70 N. Y. 404.

ception that if it would be against public policy to enforce the covenant, — for example, if a change of circumstances have rendered it improper to use land in accordance with the terms of a covenant regulating its use, or if, on account of such a change, the object of the parties to the covenant would not be accomplished by its enforcement, — equity will not interfere.⁷

§ 209. **Injunctions to restrain a Multiplicity of Suits.** — Injunctions are granted in order to prevent a multiplicity of suits under bills of peace. Bills of peace are bills to restrain a number of persons from endeavoring to enforce in different suits the same or similar claims;¹ or to prevent a single person from reiterating in several successive suits the same unsuccessful claim;² or to prevent a person from levying a tax, the payment of which will subject the plaintiff to the hazard of a number of suits from other parties;³ bills of interpleader⁴ and in the nature of interpleader;⁵ bills to enjoin a continuing trespass,⁶ nuisance,⁷ infringement of patents,⁸ copyrights⁹ and trade-marks;¹⁰ and bills to quiet possession.¹¹ Each of these classes of bills, except the last two, have been already sufficiently described. Injunctions to restrain a continuing trespass, nuisance, and the infringement of patents, copyrights and trade-marks, are more often said to be granted to prevent irreparable injury, and will, therefore, be considered under that head. An injunction to quiet the possession before the hearing formerly issued to restrain the party to whom it was directed from taking forcible possession of lands pending litigation concerning them. It was issued at the request of either a plaintiff or a defendant to a suit, if the applicant had had peaceable possession of the premises for the three years preceding the

⁷ *Duke of Bedford v. British Museum*, 2 M. & K. 552; *Troy & B. R. R. Co. v. Boston, H. T. & W. Ry. Co.*, 86 N. Y. 107; *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; *Leake's Digest of the Law of Contracts*, 1152. But see *Lloyd v. London, Chatham, & Dover Ry. Co.*, 11 Jur. (N. S.) 380.

§ 209. ¹ *Sheffield Water Works v. Yeomans*, L. R. 2 Ch. App. 8.

² *Earl of Bath v. Sherwin*, 4 Brown Parliamentary Cases, 373.

³ *Cummings v. National Bank*, 101 U. S. 153, 157; *Pelton v. National Bank*, 101 U. S. 143, 148; *Hills v. Exchange Bank*, 105 U. S. 319. See *supra*, § 12.

⁴ *Louisiana State Lottery Co. v. Clark*, 16 Fed. R. 20; s. c. 4 Woods, 169; *McLaughlin v. Swann*, 18 How. 217; *City Bank v. Skelton*, 2 Blatchf. 14. See § 88.

⁵ *Dorn v. Fox*, 61 N. Y. 264. See § 89.

⁶ *Northern Pacific R. R. Co. v. Burlington & Missouri R. R. Co.*, 2 McCrary, 203. See § 215.

⁷ *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 Fed. R. 753. See § 214.

⁸ U. S. R. S. § 4921. See § 216.

⁹ U. S. R. S. § 4970. See § 217.

¹⁰ *Shaw Stocking Co. v. Mack*, 12 Fed. R. 707. See § 218.

¹¹ *Hughes v. Morden College*, 1 Ves. Sen. 188. See *supra*, § 7.

filing of the bill, and his interest therein had not been determined by forfeiture, surrender, or other lawful means. He was required to swear to these facts in his bill, and according to the practice before Lord Bacon's time, to give a bond to the amount of £10 as a security that the information so given was true.¹² Such injunctions were formerly very common; but have now fallen into disuse. The last reported instance of one was in Lord Hardwicke's time.¹³

§ 210. **Injunctions to prevent Irreparable Injury for which the Remedy at Law is inadequate; in general.** — The most ordinary ground upon which an injunction issues, and one, indeed, which includes all but the first of those previously mentioned, is that, otherwise, the plaintiff would suffer an irreparable injury, for which damages at law would be no adequate remedy. It would be impossible specifically to mention here all the different instances in which an injunction issues for this reason; but the following is an enumeration of those of more frequent occurrence which have not been previously described. An injunction will issue on account of the inadequacy of the remedy at common law; to stay proceedings in other courts, either of law, equity, or admiralty;¹ to restrain the indorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel;² to restrain the commission of every species of waste or act in the nature of waste;³ to suppress the continuance of a public or private nuisance;⁴ to prevent a threatened destructive trespass;⁵ to prevent the infringement of patents;⁶ to prevent the violation of copyright, whether by printed publications, or theatrical representation, or otherwise;⁷ to prevent the unauthorized use of trade-marks,⁸ and the opening of private letters;⁹ to compel the performance or prevent the breach of contracts other than those for the payment of money only;¹⁰ and, under very extraordinary circumstances, to compel the delivery of personal property wrongfully withheld.¹¹

§ 211. **Injunctions to stay Proceedings in other Courts.** — Injunctions to stay proceedings in other courts are of much less

¹² Eden on Injunctions, ch. xvi. p. 240.

¹³ Hughes v. Morden College, 1 Ves. Sen. 188.

§ 210. ¹ § 211.

² § 212.

³ § 213.

⁴ § 214.

⁵ § 215.

⁶ § 216.

⁷ § 217.

⁸ § 218.

⁹ § 219.

¹⁰ § 220.

¹¹ § 221.

frequent occurrence now that discovery and the inspection of documents can be obtained at common law without the aid of equity than they were formerly ; but they are still occasionally issued, especially in bankruptcy.¹ Such injunctions must not be confounded with writs of prohibition, which are addressed to the judges of a court, whereas injunctions are directed to the parties to the proceedings which it is desired to restrain.² Ordinarily, when two courts have a concurrent jurisdiction over the same thing, whichever court was first possessed of the cause has a right to proceed with the same, and proceedings in it will not be prohibited or restrained in another.³ The Revised Statutes of the United States expressly provide that "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."⁴ Accordingly a Federal court has refused to enjoin a railway company from taking possession of land upon the termination of condemnation proceedings in a State court.⁵ A State court has no power to stay by injunction a proceeding in a court of the United States.⁶ It has been held, however, that a Federal court has power to issue an injunction to stay proceedings in a State court which interfere with the enforcement of one of its own judgments, and to stay proceedings which have been instituted or continued after the beginning or the removal of the suit in the Federal jurisdiction.⁷

§ 211. ¹ *McLean v. Lafayette Bank*, 3 McLean, 185. *In re Schwarz*, 14 Fed. R. 787.

² See *Eden on Injunctions*, ch. ii.; *Peck v. Jenness*, 7 How. 624; *Dillon v. Kansas City S. B. Ry. Co.*, 43 Fed. R. 109, 111.

³ *Nicholas v. Nicholas*, Prec. in Ch. 546; *Daniel's Ch. Pr.* (2d Am. ed.) 1845; *supra* §§ 9, 10. But see the *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637.

⁴ U. S. R. S. § 720. See the *Slaughter House Cases*, 10 Wall. 273; *Haines v. Carpenter*, 91 U. S. 254; *Dial v. Reynolds*, 96 U. S. 340; *Rensselaer & S. R. R. Co. v. Bennington & R. R. Co.*, 18 Fed. R. 617; *Missouri, K. & T. Ry. Co. v. Scott*, 13 Fed. R. 793; s. c. 4 Woods, 386; *Hamilton v. Walsh*, 23 Fed. R. 420; *Tift v. Iron Clad Manuf. Co.*, 16

Blatchf. 48; *Yick Wo v. Crowley*, 26 Fed. R. 207.

⁵ *Dillon v. Kansas City S. B. Ry. Co.*, 43 Fed. R. 109.

⁶ *McKim v. Voorhies*, 7 Cranch, 279; *Duncan v. Darst*, 1 How. 301-306; *City Bank of New York v. Skelton*, 2 *Blatchf.* 14.

⁷ *French v. Hay*, 22 Wall. 250; *Dietzsch v. Huidekoper*, 103 U. S. 494; *Fisk v. Union Pacific R. R. Co.*, 10 *Blatchf.* 518; *Sharon v. Terry*, 36 Fed. R. 337; *Baltimore & O. R. Co. v. Ford*, 35 Fed. R. 170.

Jesup v. Wabash, St. L. & P. Ry. Co., 44 Fed. R. 663, 664-667, *per Ricks, J.* : —

"The plaintiff, in his petition in said court of common pleas, bases his right to recover against the defendant, as the re-organized railroad company and pur-

Such an injunction will rarely be issued.⁸ But proceedings in a State court cannot be enjoined upon the sole ground that they are taken under a State statute which is repugnant to the

chaser of the property foreclosed, as above stated, upon the ground that the circuit courts of the United States, in foreclosing said property, made a decree or order providing that the said receiver, John McNulty, should turn over to the purchasers of said railroad property all the assets, books, vouchers, accounts and property in his custody as such receiver, and be discharged from all further liability as such receiver, upon the following conditions, which I quote from the order of the court:—

“The court orders the delivery of such receivership assets, papers, and property to the Wabash Railroad Company, on the express condition that the last-named corporation agrees to pay, satisfy, and finally discharge all the debts and liabilities of such receivership of every kind now remaining unpaid, and that it may further defend in the name of such receiver all litigated claims or demands against such receivership now pending in this or other courts, and will fully abide by and pay any and all judgments and recoveries, together with costs, which may be rendered in any of such actions or litigations, and always protect and save harmless the said receiver from such claims or any of them.”

“This order was made by this court after the confirmation of the sale theretofore made, and the conditions therein required to be performed by the purchaser were substantially and in fact a part of the consideration exacted from such purchasers for said railroad property. This court authorized the receiver to deliver to the said purchaser all of the assets and property in his hands, upon the condition that said purchaser would save harmless the said receiver from all claims of every kind that might be preferred against him. It is therefore clearly the duty of this court to see that such purchaser is not required to pay or satisfy any claim or judgment of any kind that would not be a proper and just liability of said re-

ceiver. If this court had not discharged said receiver upon the conditions recited in the order, releasing him from further responsibility in connection with this property, it would have retained the assets, books, and vouchers in his hands, and adjusted all the liabilities incurred by him as receiver, by and through the proceedings customary in such cases. It is clearly the duty of this court to protect the purchaser of this property to the same extent, and in the same manner, that it would have protected the receiver if he had been retained for the purpose of settling all these outstanding claims. When the purchaser bought this property it purchased it upon the conditions named in the decree and order of sale. The purchase price so obtained became a fund in the hands of this court for distribution to the beneficiaries under its decree. The court would certainly protect this fund from being diverted. It would take every precaution to see that no party received any portion of it unless justly entitled thereto. But this agreement to pay such just claims as might be allowed against the receiver, as before stated, is, in fact, a part of the price paid by the said purchaser for the road, and it is the duty of the court to protect it against any unjust claims, by the same diligence and care that it would protect the fund if actually in the registry of the court for distribution. The distribution of this fund, and the allowance of claims against the receiver, which is in fact a part of the purchase price, is exclusively within the control of this court. As the court would not allow any other tribunal to distribute any part of the purchase price, so it cannot properly or safely allow any other tribunal to say what are proper claims against the receiver to be paid out of this fund, or by the purchaser as a part of its purchase price, for the property. In order to so fully protect the purchaser and fairly retain control of all claims against the receiver which such purchaser

⁸ *Frishman v. Insurance Co.*, 41 Fed. R. 449.

Federal Constitution.⁹ A judge of a Circuit or District Court has no power to enjoin the enforcement of a judgment in a State court after an appeal to the Supreme Court of the United States

should be required to pay, this court must retain jurisdiction of all cases which involve the liability of its receiver. It must retain or acquire such jurisdiction in order that such liability may be adjusted and determined according to the equitable principles controlling this court in such proceedings. The plaintiff in this case had the right, under the act of August, 1888, to sue this receiver in the Court of Common Pleas of Defiance County for the torts committed by him as such receiver. He had the right to bring such action without the leave of this court. Any judgment that he might have obtained in such court would have been subject to the equitable scrutiny of this court before it would have been allowed as a valid claim against the receiver; but the plaintiff's right to sue the receiver was fixed and indisputable. He chose not to avail himself of this right while it existed, but after the discharge of the receiver, and, when the purchaser of the foreclosed railroad property assumed the possession and management of it, he institutes this suit against such purchaser, and seeks to hold it liable for torts committed by the receiver during his management of said property under the orders of this court. While he bases his right to recover upon the express stipulation of the purchaser, made in this court, that it would pay all the liabilities of the receiver upon condition that the assets of the receiver and the control of the property purchased were turned over to it, yet the plaintiff elected to bring this suit against the purchaser instead of the receiver, because of some supposed legal advantage he could derive by reason of a suit against the former instead of the latter. But his right of action no longer exists against the receiver, because the receiver has been discharged, and released from all liability by express order of this court. He ought, therefore, to have no greater right against the purchaser than he has against the

receiver. Whatever right or claim he has is against the fund in this court arising from the sale of said mortgaged property.

"The promise and agreement of the purchaser constituted an additional consideration, and thereby added to said fund, as we have before stated; but in good faith to said purchaser it is the duty of this court to sift, scrutinize, and finally determine what claims shall be paid, and what claims shall be rejected. In order to do this satisfactorily this court should require all parties who assert any claim against such fund, or who claim any right to recover against said purchaser because of the stipulation and covenant made in this court, to establish such claim in this tribunal by proceedings usual in this class of cases. But if the said Potterf were permitted to prosecute his action in the State court, and recover a judgment thereon, he would have a right to satisfy said judgment out of any property subject to levy in the hands of the purchaser, the Wabash Railway Company; whereas, under the covenants and agreements made in this court between the court and the purchaser, placing upon said covenants the legal construction hereinbefore given, any claim he might have against the receiver was to be satisfied out of the fund arising from the sale of this mortgaged property. While counsel in arguing the case assured the court that they expected, in case they recovered a judgment, to come to this court and ask to have it allowed and paid by the purchaser on this covenant, to which reference has been made, yet there is no legal barrier which would prevent the plaintiff from satisfying such judgment by levy and sale of subsequently acquired property in the hands of the purchaser. This places him in a more advantageous legal position than he occupied with a claim against the receiver, which could be satisfied only out of the fund or property in the receiver's control.

⁹ *Rensselaer & S. R. Co. v. Bennington & R. R. Co.*, 18 Fed. R. 617.

and a *superseateas*.¹⁰ That can only be done, if at all, by a justice of the Supreme Court.¹¹ It has been held that a Federal court may enjoin proceedings in a State court which would deprive a citizen of the United States, or other person within the jurisdiction thereof, of any right, privilege, or immunity secured by the Constitution or laws of the United States;¹² that a Federal court can prevent by injunction the levy of a State sheriff under State process against a State judgment-debtor upon the property of a stranger to the suit and process;¹³ that a Federal court may enjoin the inequitable use of a judgment of a State court when the validity of the judgment is not thereby impaired;¹⁴ that under the act of Congress limiting the liability of the owners of ships, a District Court of the United States may issue a stay-order restraining proceedings previously begun in State courts;¹⁵ and that when a creditor of a corporation has begun proceedings in a Federal court to enforce his claim against the corporation, the defendant corporation may be enjoined "from taking proceedings for its own dissolution, or for the appointment of a receiver of its effects, or for the distribution thereof among its stock-

"But it is further contended by counsel that the Wabash Railway Company cannot now ask for this stay of proceedings because it entered its appearance in the State court, and thereby conceded its jurisdiction. The appearance entered by the counsel for the said railway company would not have prevented it from asking the State court to remove said case to this court if the citizenship of the parties and the amount involved had been such as to justify such a request, and I do not think it prevents the said railway company from asking the relief it now demands. The jurisdiction of the court of common pleas, so far as the residence of the parties is concerned, is undisputed. It is because of the subject-matter of said contention that this court acquires jurisdiction. The exact character and nature of the suit were only developed by the motions made by the counsel for the defendant in the State court after the original suit was instituted; and when the pleadings properly revealed the actual basis upon which the plaintiff founded his action, the petitioner at once invoked the jurisdiction of this

court to restrain said proceedings because of the nature thereof. For these reasons I think the order heretofore made restraining said plaintiff from further proceeding against the receiver in the State court was properly allowed, and an order may now be drawn authorizing an injunction to issue perpetually restraining him from further prosecuting said suit. If said Potterf chooses to avail himself of the privilege of filing his claim in this court, against the receiver, he may do so, and such further proceedings will be directed as the equities of the case demand. A decree may be prepared in accordance with this opinion." See *infra*, § 251.

¹⁰ *Murray v. Overstoltz*, 8 Fed. R. 110.

¹¹ *Murray v. Overstoltz*, 8 Fed. R. 110.

¹² *Tuchman v. Welch*, 42 Fed. R. 548; reversed s. c. 45 Fed. R. 283; criticised in 24 American Law Review, 661. See U. S. R. S. § 1979.

¹³ *Cropper v. Coburn*, 2 Curt. 465.

¹⁴ *Linton v. Mosgrove*, 14 Fed. R. 543.

¹⁵ *In re Long Island, N. S. P. & F. Transportation Co.*, 5 Fed. R. 599. See *Providence & N. Y. S. S. Co. v. Hill Manuf. Co.*, 109 U. S. 578, 600.

holders and any other persons, and from making any distribution or transfer of any of its effects.”¹⁶ An injunction granted by a State court to stay proceedings in the same or another tribunal of the State remains in force after a removal to a Federal court of the suit in which it was granted,¹⁷ although such an injunction could not be originally issued in the Federal court in a suit removed from a State court.¹⁸ Except in an extraordinary case to prevent irreparable injury to property or business interests,¹⁹ an injunction will not be issued to stay a criminal proceeding,²⁰ a proceeding in its nature criminal, as for the removal of an officer,²¹ or an application for a mandamus.²² “This court,” said Lord Hardwicke, “has no jurisdiction to stay proceedings on a mandamus; nor to an indictment; nor to an information; nor to a writ of prohibition, that I know of.”²³ Judge Billings recently said: “The extent to which such a bill will lie is well defined. It is when the parties sought to be enjoined have, as plaintiffs, submitted themselves to the court by a bill in equity as to the matters affected by or involved in the criminal procedure. In such case the court will by a decree affecting the parties so situated personally enjoin.”²⁴ It has been doubted whether a Federal Circuit Court has the power to enjoin the prosecution of a suit in a Federal court in another circuit.²⁵ Such an injunction has been refused when sought by a defendant to a patent-suit for the purpose of enjoining the prosecution of suits previously brought upon the same patent.²⁶ The subsequent commencement of suits upon the same patent has been enjoined.²⁷ It was at first

¹⁶ *Fisk v. Railroad Co.*, 10 Blatchf. 518. But see *Kessler v. Continental, C. & I. Co.*, 42 Fed. R. 258.

¹⁷ *Smith v. Schwed*, 6 Fed. R. 455; *Perry v. Sharpe*, 8 Fed. R. 15. But see *Lawrence v. Morgan's R. R. & S. S. Co.*, 121 U. S. 634.

¹⁸ *Diggs v. Wolcott*, 4 Cranch, 179.

¹⁹ *M. Schandler Bottling Co. v. Welch*, 42 Fed. R. 561; *Tuchman v. Welch*, 42 Fed. R. 548. Same cases reversed, 45 Fed. R. 283, criticised in 24 *American Law Review*, 661.

²⁰ *Lord Montague v. Dudman*, 2 Ves. Sen. 396, *Attorney-General v. Cleaver*, 18 Ves. 211, 220; *Saull v. Browne*, L. R. 10 Ch. App. 64, *Spink v. Francis*, 19 Fed. R. 670; s. c. 20 Fed. R. 567; *Suess v.*

Noble, 31 Fed. R. 855; *In re Sawyer*, 124 U. S. 200. But see *M. Schandler Bottling Co. v. Welch*, 42 Fed. R. 561; reversed s. c. 45 Fed. R. 283.

²¹ *In re Sawyer*, 124 U. S. 200.

²² *Lord Montague v. Dudman*, 2 Ves. Sen. 396, 398.

²³ *Lord Montague v. Dudman*, 2 Ves. Sen. 396, 398.

²⁴ *Spink v. Francis*, 19 Fed. R. 670, 671; s. c. 20 Fed. R. 567, 569. So held in *Mayor of York v. Pilkington*, 2 Atk. 302.

²⁵ *Kelley v. Ypsilanti Dress-Stay Manuf. Co.*, 44 Fed. R. 19, 20, *per Brown, J.*

²⁶ *Kelley v. Ypsilanti Dress-Stay Manuf. Co.*, 44 Fed. R. 19.

²⁷ *Birdsall v. Manuf. Co.*, 1 *Hughes*, 64.

held that a court had no power to restrain a defendant from suing in a foreign court;²⁸ but it seems now to be established that it can do so,²⁹ though such a power is exercised with great caution.³⁰ It has been held that, in a suit by the United States to vacate a patent for an invention, a preliminary injunction will not be granted to restrain the prosecution by the defendant of suits for the infringement of the patent.³¹ Where a plaintiff is bringing suits upon the same patent against different defendants, who rely upon the same defenses, the court may stay proceedings in all but one till the validity of the patent has been finally determined in the excepted case.³² But where some of the defendants set up different defenses, it was held that the court "could not restrain in part and permit in part the prosecution of the cases. It would have no right to issue an injunction which should [*sic*] have the effect to split up the cases, enjoining their prosecution as to some branches of the controversy and permitting it as to the others."³³ An injunction order providing "that all suits and proceedings on the part of" certain persons "against the said bankrupt, to collect the debt set forth, be, and the same are hereby stayed, to await the determination of the Court in bankruptcy on the question of the discharge therein," was held violated by those who, after discontinuing a suit then pending, subsequently instituted another to recover the same claim, with new allegations charging fraud.³⁴

§ 212. **Injunctions to restrain the Alienation of Property.** — Injunctions may be obtained to prevent the alienation of property "where it would work irremediable or gross injustice."¹ An injunction will, therefore, issue to prevent the transfer of notes, bills of exchange, and other documents, whether negotiable or not, whose possession gives their holder a presumptive title to the rights which they evidence,² when obtained from the plain-

²⁸ *Love v. Baker*, 1 Ch. Cas. 67, decided by Lord Clarendon; but the reporter added, "*sed quære*, for all the bar was of another opinion."

²⁹ *Bunbury v. Bunbury*, 1 Beav. 318; *Dehon v. Foster*, 4 Allen (Mass.), 545. *Engel v. Scheuerman*, 40 Ga. 206; *Massie v. Watts*, 6 Cranch, 118.

³⁰ *Vail v. Knapp*, 49 Barb. (N.Y.), 209; *Story's Eq. Jur.* §§ 899, 900.

³¹ *United States v. Colgate*, 21 Fed. R. 318.

³² *Birdsell v. Hagerstown Ag. Imp. Man. Co.*, 1 Hughes, 64; *Rumford Chemical Works v. Hecker*, 5 Off. Gaz. 644; *Allis v. Stowell*, 16 Fed. R. 783; *Nat. Cash Register Co. v. Boston Cash I. & R. Co.*, 41 Fed. R. 51.

³³ *Dyer, J.*, in *Allis v. Stowell*, 16 Fed. R. 783, 790.

³⁴ In the Matter of *Schwarz*, 14 Fed. R. 787.

§ 212. ¹ *Story's Eq. Jur.* § 953.

² *Osborn v. United States Bank*, 9

tiff by the defendant through duress, fraud, or other iniquity; or when forged;³ or when, though the holder may have properly obtained them, he threatens or is about to use them in an inequitable manner.⁴ An injunction may be granted to prevent a party from making vexatious alienations of land pending a suit concerning the title to the same.⁵ For it was said that, otherwise, the plaintiff might be put to the expense of making each vendee or grantor a party to the proceedings; and, at all events, his title, if he prevails in the suit, may be embarrassed by the new outstanding claims of title under the threatened transfer.⁶ The sale or transfer,⁷ or removal beyond the jurisdiction of the court⁸ of a chattel, the loss of which could not be compensated in damages, may also be thus restrained; and so has been the sale of other personal property.⁹ Injunctions have also been granted at the suit of a part-owner to prevent the sailing of a ship until his share could be ascertained, and a bond given to secure him against loss upon the voyage;¹⁰ to prevent the removal of timber wrongfully cut down;¹¹ and to prevent the trustees of a dissenting chapel from appointing as a minister a person not duly qualified according to its constitution.¹²

§ 213. **Injunctions to prevent Waste.**—An injunction will issue to prevent waste, whether legal or purely equitable.¹ Waste is a permanent injury to real estate committed by a person in possession with a limited interest in the same. Legal waste consists of such acts as would be considered waste at common law; equitable waste, of such acts as at law would not, under the circumstances of the case, be considered waste, but which are so

Wheat. 738, 845; *Lloyd v. Gurdon*, 2 Swanst. 180; *Hood v. Aston*, 1 Russ. 412; *Lord Chedworth v. Edwards*, 8 Ves. 46; *Reeve v. Parkins*, 2 J. & W. 390; *Schermerhorn v. L'Espenasse*, 2 Dall. 360.

² *Esdaile v. La Nauze*, 1 Y. & C. 394.

⁴ *Anon.*, 6 Madd. 10.

⁵ *Daly v. Kelly*, 4 Dow, 417; *Echcliff v. Baldwin*, 16 Ves. 267. But see *Turner v. Wight*, 4 Beav. 40.

⁶ *Daniell's Ch. Pr.* (2d Am. ed.) 1873.

⁷ *Gibson v. Lewis*, 11 Phila. (Pa.) 476; *Lady Arundell v. Phipps*, 10 Ves. 139; *Daniell's Ch. Pr.* (2d Am. ed.) 1872.

⁸ *Green v. Hanberry*, 2 Brock. 403; *Haly v. Goodson*, 2 Mer. 77; *Christie v. Craig*, 2 Mer. 137.

⁹ *Bateau v. Bernard*, 3 Blatchf. 244; *Higgins v. Jenks*, 3 Ware, 17.

¹⁰ *Haly v. Goodson*, 2 Mer. 77; *Christie v. Craig*, 2 Mer. 137. But see *Wilkinson v. Dobbie*, 12 Blatchf. 298.

¹¹ *Bradley v. Reed*, 2 Pittsb. (Pa.) 519; *Anon.*, 1 Ves. Jr. 93; *Daniell's Ch. Pr.* (2d Am. ed.) 1874.

¹² *Milligan v. Mitchell*, 1 M. & K. 446. § 213. ¹ *Garth v. Cotton*, 1 Dickens, 183; *Thruston v. Mustin*, 3 Cranch C. C. 335; *United States v. Gear*, 3 How. 120; *Fletcher v. New Orleans N. E. R. R. Co.*, 20 Fed. R. 345; *Lanier v. Alison*, 31 Fed. R. 100; *Bispham's Eq. §§ 429-432.*

esteemed in the view of a court of equity, from their manifest injury to the inheritance, though not inconsistent with the legal rights of the party committing them.² Such is wilful and wanton injury to land committed by a tenant without impeachment for waste.³ The interference of equity in cases of this kind is justified, not only by the fear of irremediable injury, but also because the tenant for life or years is considered to stand in a trust relation toward the remainder-man. So anxious is equity to prevent waste, that it has sustained a bill praying such an injunction filed in behalf of a child in its mother's womb.⁴ An injunction will be granted to restrain acts in the nature of waste committed by one in possession of land the title to which is in litigation.⁵ It has been held that an applicant for the purchase of government land whose claim is disputed in the land office cannot obtain an injunction to prevent acts of waste by county officers.⁶

§ 214. **Injunctions to prevent the Continuance of a Nuisance.**—The interference of equity to enjoin the continuance of a nuisance is not only due to the fact that the acts complained of produce irreparable injury, but also is allowed to prevent the multiplicity of suits that would be necessary were the plaintiff confined to his remedy at common law.¹ Nuisances are of two kinds: those which are injurious to the public at large, and those which are injurious to the rights and interests of private persons.² The use of this remedy to suppress a public nuisance is of very ancient date.³ It was applicable in England, both to nuisances strictly so called and to *purprestures*. “By *purpresture* is meant, in its present acceptance, an incroachment upon the Crown, either upon part of the demesne lands, or upon the high roads, rivers, ports, or streets; and the difference between *purprestures* and nuisances consists in this, that where the *jus privatum* of the Crown is invaded it is a *purpresture*, but where the *jus publicum* is violated it is a *nuisance*. In cases of pur-

² Daniell's Ch. Pr. (2d Am. ed.) 1854, 1855.

³ Vane v. Lord Barnard, 2 Vern. 738; Garth v. Sir John Hind Cotton, 1 Dickens, 183; s. c. 1 White & Tudor's Leading Cases in Equity (6th ed.), 806; Bispham's Eq. § 434.

⁴ Musgrave v. Parry, 2 Vern. 710; Lutterel's Case, cited Prec. Ch. 50; Scatterwood v. Edge, 1 Salk. 229.

⁵ United States v. Parrott, 1 McAll. 271; Lanier v. Alison, 31 Fed. R. 100.

⁶ McBride v. Board of Commissioners of Pierce County 44 Fed. R. 17.

§ 214. ¹ Fishmongers' Co. v. East India Co., 1 Dickens, 163; Attorney-General v. Nichol, 16 Ves. 338, 343.

² Daniell's Ch. Pr. (2d Am. ed.) 1857.

³ Daniell's Ch. Pr. (2d Am. ed.) 1857.

prestore the remedy is either by information for an intrusion at the common law, or by information in equity at the suit of the attorney-general. The consequence of a judgment at common law being the abatement of the erection or grievance complained of, whether it is or is not a nuisance, whilst upon an information in equity, where the trespass does not produce any public injury, the court may direct an inquiry whether it is most beneficial to the Crown to abate the purpresture, or to suffer the erection to remain and be assessed as a part of the legal revenue."⁴ Cases of public nuisance may be enjoined at the suit of the attorney-general, who in England sues by information.⁵ A public nuisance may also be restrained at the suit of any who have suffered by it special damage distinct from that which it causes to the public at large; but not otherwise.⁶ A bill, for example, may be filed by a State to enjoin the erection of a bridge across a navigable stream which will injure her commerce;⁷ but not by a city for a similar reason,⁸ unless its property, for example, a wharf, is thereby injured.⁹ The United States may obtain an injunction against a nuisance which threatens injury to works in aid of commerce which are constructed under the authority of the national government.¹⁰ A private nuisance is an act, or series of acts, unaccompanied by an act of trespass, which causes a substantial injury to a person's property, health, or comfort. It will always be restrained when it would otherwise cause an irreparable injury or a multiplicity of suits.¹¹ "It used to be thought, that if a man knew there was a nuisance, and went and lived near it, he could not recover, because, it was said, it is he that goes to the nuisance, and not the nuisance to him. This, however, is not the law

⁴ Daniell's Ch. Pr. (2d Am. ed.) 1857. citing *Attorney-General v. Richards*, 2 Anst. 603; *Attorney-General v. Johnson*, 2 J. Wil. 87. See also *United States v. Gear*, 3 How. 120.

⁵ Daniell's Ch. Pr. (2d Am. ed.) 1858.

⁶ *Baines v. Baker*, Amb. 158; *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black, 485; *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91; *Irwin v. Dixon*, 9 How. 10; *Spooner v. McConnell*, 1 McLean, 337; *Works v. Junction R. R.*, 5 McLean, 425.

⁷ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518.

⁸ *Georgetown v. Alexandria Canal Co.*, 12 Pet. 91.

⁹ *St. Louis v. Knapp Co.*, 104 U. S. 658.

¹⁰ *United States v. Mississippi & R. R. Boom Co.*, 3 Fed. R. 548; s. c. 1 McCrary, 601.

¹¹ *Osborne v. Barter & Goddins*, anno 26 Eliz., *Choyce Cases in Chancery* (ed. of 1870), p. 176; *Parker v. Winnipiseogee Lake C. & W. Co.*, 2 Black, 545; *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 Fed. R. 753; *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642.

now.”¹² Formerly, an injunction was rarely issued to restrain a nuisance until the plaintiff’s right of action had been established at law; “but now a suit at law is no longer a necessary preliminary, and the right to an injunction, in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy.”¹³ Formerly, it was a fundamental objection to an order for an injunction to restrain a nuisance to land when the legal title was disputed, that the order contained no provision for putting the question in a course of legal investigation.¹⁴

§ 215. **Injunctions to restrain Trespass.** — Injunctions to restrain trespass are of quite recent origin. The first that is to be found in the books was granted by Lord Thurlow.¹ They are only granted when the trespass is destructive or continuous. The rule upon the subject has been thus stated by Vice-Chancellor Kindersley: “Where, therefore, the plaintiff is in possession and the person doing the acts complained of is an utter stranger, not claiming under color of right, the tendency of the court is not to grant an injunction, unless there are special circumstances, but to leave the plaintiff to his remedy at law; though, where the acts tend to the destruction of the estate, the court will grant it.”² But where the party in possession seeks to restrain one who claims by adverse title, then the tendency will be to grant the injunction, at least where the acts done either did or might tend to the destruction of the estate.”³ The destruction of credit by an illegal seizure of one’s stock in trade,⁴ and the injury to a farm done by the illegal taking of all the stock and tools upon it, have been held instances of such irreparable injury.⁵ An attempt by a railroad company to build its road upon private property without payment of compensation, may be thus pre-

¹² Byles, J., in *Hole v. Barlow*, 4 C. B. n. s. 334. See *St. Helen’s Smelting Co. v. Tipping*, 11 H. L. C. 642; *Campbell v. Seaman*, 63 N. Y. 568.

¹³ Judge Earl in *Campbell v. Seaman*, 63 N. Y. 568, 582. See, however, *Irwin v. Dixon*, 9 How. 10; *Murtagh v. Philadelphia*, 1 Weekly Notes of Cases, 37. But see *McBride v. Board of Commissioners of Pierce County*, 44 Fed. R. 17.

¹⁴ *Harman v. Jones*, Cr. & Ph. 299; *Sanxter v. Foster*, Cr. & Ph. 302.

§ 215. ¹ *Flamang’s case*, cited by

Lord Eldon in *Hanson v. Gardiner*, 7 Ves. 305. For injunctions against the collection of an illegal tax, see *supra*, § 12.

² See *Jerome v. Ross*, 7 J. Ch. (N. Y.) 315; *Troy & B. R. R. Co. v. Boston*, H. T. & W. Ry. Co. 86 N. Y. 107; *Van Norden v. Morton*, 99 U. S. 378.

³ *Lowndes v. Bettie*, 33 L. J. Ch. 461.

⁴ *Watson v. Sutherland*, 5 Wall. 74; *Cropper v. Coburn*, 2 Curt. 465; *North v. Peters*, 138 U. S. 271.

⁵ *Breeden v. Lee*, 2 Hughes, 484.

vented.⁶ It is not certain, whether the fact that a person who threatens to commit a wrong is insolvent and unable to pay any damages which could be recovered at law, is in itself a sufficient ground for the interference of equity by injunction; but the weight of authority seems to hold that it is.⁷ It was held, where there was a dispute as to the possession and as to right to the possession of a railroad track, that the court would not interfere by injunction to assist in "a scramble for possession."⁸ A number of cases decided in the courts of different States hold that an injunction cannot be obtained to restrain an illegal arrest; since it is said that the writ of *habeas corpus* followed by an action for damages always affords an adequate remedy for any injury resulting therefrom;⁹ but if the result of the arrests would be an irreparable injury to the business of the complainant, an injunction might perhaps be issued.¹⁰

§ 216. Injunctions to restrain the Infringement of Patents. — Injunctions to restrain the infringement of patents and copyrights are of ancient use in equity. They are founded upon both the irreparable injury that would otherwise be caused to the complainant, and the desire of the court to prevent a multiplicity of suits.¹ This inherent power of the courts is confirmed in the United States by statute. The provision of the Revised Statutes authorizing injunctions to restrain the infringement of patents is

⁶ Northern Pacific R. R. Co. v. Burlington & M. R. R. Co., 2 McCrary, 203; s. c. 4 Fed. R. 298. See also Missouri, K. & T. Ry. Co. v. Texas & St. Louis Ry. Co., 10 Fed. R. 497.

⁷ Connolly v. Belt, 5 Cranch C. C. 405; McElroy v. Kansas City, 21 Fed. R. 257, 262; Agar v. Regent's Canal Co., cited in 1 Swanst. 250; Musselman v. Marquis, 18 Cal. 206; Britton v. Hill, 12 C. E. Green (N. J.), 389; Lloyd v. Heath, Busbee's Eq. (N. C.) 39; Gause v. Perkins, 3 Jones Eq. (N. C.) 177; Chesapeake & Ohio R. R. Co. v. Patton, 5 W. Va. 234; Bispham's Eq. § 436; Caro v. Met. El. Ry. Co., 46 N. Y. Super. Ct. 138. *Contra*, Heilman v. The Union Canal Co., 37 Pa. St. 100; Thompson v. Williams, 1 Jones Eq. (N. C.) 176; Nettle v. Reese, 19 Abb. Pr. (N. Y.) 240; High on Injunctions, § 18.

⁸ St. Louis, K. C. & C. Ry. Co. v. Dewees, 23 Fed. R. 691. See Latham v. Northern Pac. R. Co., 45 Fed. R. 721.

⁹ Cohen v. Commissioners of Goldsboro, 77 N. C. 2; Burnett v. Craig, 30 Ala. 135; Burch v. Cavanaugh, 12 Abb. Pr. n. s. (N. Y.) 410; Davis v. American Society for Prevention of Cruelty to Animals, 6 Daly (N. Y.), 81; s. c. on appeal, 75 N. Y. 362. See also Yick Wo v. Crowley, 26 Fed. R. 207; and *supra*, § 211.

¹⁰ Louisiana State Lottery Co v. Fitzpatrick, 3 Woods, 222; Dinsmore v. New York Board of Police, 12 Abb. N. Cas. (N. Y.) 436; Manhattan Iron Works Co. v. French, 12 Abb. N. Cas. (N. Y.) 446.

§ 216. ¹ Eden on Injunctions, chs. xii. and xiii.; Daniell's Ch. Pr. (5th Am. ed.) 1642-1648; Hogg v. Kirby, 8 Ves. 215; Wilkins v. Aikin, 17 Ves. 422.

as follows: "The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by a patent, upon such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same power to increase such damages, in its discretion, as is given to increase damages found by verdicts in actions in the nature of actions of trespass upon the case."² It seems to have been formerly the opinion that courts of equity would not interfere to protect a patent right by injunction, until the right had been established at law; but since Lord Eldon's time their jurisdiction to thus interfere, when the title of a complainant is established by the preponderance of evidence, has been undisputed.³ In a recent case Judge Lowell said: "The principles which govern courts in granting or refusing preliminary injunctions in patent cases are well established. As a general rule, if the plaintiff had made out a clear title, and the question of infringement presents no difficulty, an injunction will be granted. The hearing is had upon *ex parte* affidavits, and if the questions to be decided are difficult and complicated, especially if they involve disputed facts which have never been passed upon by a court or jury, then, although the court may be inclined to think the complainant is right, yet it will not interfere at this stage of the cause, whether the questions relate to title or to infringement. And even where the title is clear, yet if there are peculiar circumstances which show that the defendant's interests would be injuriously affected by an injunction, while those of the plaintiff would not be so affected by refusing it, it may be refused. Such were the cases of *Howe v. Morton*, *Fisher's Pat. Cases*, vol. i. 586, decided by Judge Sprague, and the *Burring-machine case*, *Morris v. Lowell Mfg*

² U. S. R. S. § 4921. See *supra*, §§ 77, 144.

³ *Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 687; *Hill v.*

Thompson, 3 Meriv. 622; *Pierpont v. Fowle*, 2 W. & M. 23; *Motte v. Bennett*, 2 Fisher, 642. Kerr on Injunctions, 272.

Co., Fisher's Pat. Cases, vol. iii. 67, which came before me; in both of which the patent was about to expire, and the defendant's business would be very seriously interfered with for the few weeks that the exclusive right would remain in force, only to be resumed again immediately afterward at great expense and loss. There is, therefore, always an element of discretion entering into the consideration of this question, and all that a complainant is entitled to is the best judgment of the court upon a question of judicial discretion, and not absolutely to an injunction on any given state of facts. . . . These cases being tried, as I have said, on *ex parte* evidence, must be decided on broad views of the rights of the parties. It is usual to present proof, either of long and general acquiescence in the plaintiff's exclusive rights, or of their having been sustained by the courts. The ground on which acquiescence is important is that it shows exclusive possession, which, if it has been of long standing, open and notorious, is a clear foundation of a presumption of title. It is not always, however, so satisfactory as positive adjudications, because it may have arisen from the comparatively small commercial value of the invention, and in that case shows only that no one has thought it worth infringing."⁴ If serious public inconvenience would result from a preliminary injunction, the application may be denied.⁵ If previous adjudications in the same or other Circuit Courts have established the validity of the plaintiff's patent, a preliminary injunction will be granted him almost as of course in a subsequent suit, to prevent the infringement of the same by a person not a party to those suits,⁶ unless the latter can produce new evidence,⁷ or show that such judgments were obtained by consent, collusion, or fraud.⁸ In

⁴ *Potter v. Whitney*, 1 Lowell, 87, 88, 89. See also *Hill v. Thompson*, 3 Meriv. 622; *Washburn & Moen Manuf. Co. v. Haish*, 4 Fed. R. 900; *Foster v. Moore*, 1 Curt. 279; *McKay v. Dibert*, 5 Fed. R. 587.

⁵ *Southwestern Brush E. L. & P. Co. v. Louisiana El. L. Co.*, 45 Fed. R. 893; *Bliss v. City of Brooklyn*, 4 Fisher's Pat. Cas. 596; *Robinson on Patents*, § 1200 and cases cited.

⁶ *Newall v. Wilson*, 2 DeG., M. & G. 280; *Orr v. Littlefield*, 1 W. & M. 13; *Thayer v. Wales*, 9 Blatchf. 170; s. c.

5 Fisher, 130; *Kirby Bung Manuf. Co. v. White*, 1 Fed. R. 604; *High on Injunctions*, §§ 953-959; *Kerr on Injunctions*, 273. But see *Many v. Sizer*, 1 Fisher Pat. Cas. 31.

⁷ *Page v. Holmes Burglar Alarm Tel. Co.*, 2 Fed. R. 300; s. c. 18 Blatchf. 118.

⁸ *American Nicolson Pavement Co. v. City of Elizabeth*, 4 Fisher, 189; *Page v. H. B. A. Tel. Co.*, 2 Fed. R. 330; *American Middlings Purifier Co. v. Vail*, 15 Blatchf. 315. But see *Orr v. Littlefield*, 1 W. & M. 13.

such cases the courts will usually examine only the question of the infringement.⁹ But it may, and before granting a perpetual injunction often does, reconsider the whole question.¹⁰ Otherwise, however, when the patent is of recent issue, and its validity is denied by sufficient evidence to raise a reasonable doubt in the mind of the judge as to a question either of fact or of law; a preliminary injunction will usually be refused;¹¹ although now that, in the Federal courts, the same judges sit both at law and in equity, and when sitting in equity have the power to submit a disputed question of fact to a jury, such a court usually determines the whole question upon its final decree, without adopting the circuitous method of first directing a trial at law.¹² Formerly the custom was, when any doubt remained in the mind of the court after the final hearing, to deny the complainant a perpetual injunction at that time; but to direct that the cause "stand over a reasonable time for the bringing of a suit at law against the defendants for an infringement; and, if such a suit is brought, until a sufficient time for the trial thereof has elapsed. And if, in such suit, there shall be final judgment for the plaintiffs, they will be entitled to a decree for injunction and account, as prayed for in the bill: and if, in such suit, there shall be final judgment for the defendants, the bill will be dismissed with costs: and so, also, it will be dismissed with costs on an application of the defendants, if such suit is not brought within a reasonable time, and prosecuted with reasonable diligence."¹³ An *ex parte* application for an injunction to restrain the infringement of a patent should, it seems, be supported by an affidavit, or an allegation in a bill verified by affidavit of the plaintiff, stating that he believes that the person to whom the patent was issued was the original inventor thereof, or that the invention was new, or had not been

⁹ *Robertson v. Hill*, 6 Fisher, 465; *Odorless Excavating Co. v. Lauman*, 12 Fed. R. 788.

¹⁰ *Many v. Sizer*, 1 Fisher Pat. Cas. 31; *Day v. Hartshorn*, 3 Fisher, 32; *Parker v. Sears*, 1 Fisher Pat. Cas. 93; *Poppenhuisen v. Faulke*, 1 Blatchf. 493; *Sargent Manufacturing Co. v. Woodruff*, 5 Biss. 444.

¹¹ *Parker v. Sears*, 1 Fisher Pat. Cas. 93; *American Nicolson Pavement Co. v. City of Elizabeth*, 4 Fisher, 189; *Dodge v. Card*, 2 Fisher, 116; *Sullivan v. Redfield*, 1 Paine, 441; *Winans v. Eaton*, 1

Fisher Pat. Cas. 181; *Mowry v. Grand Street & N. R. Co.*, 10 Blatchf. 89; s. c. 5 Fisher, 586; *Smith v. Cummings*, 1 Fisher Pat. Cas. 152; *McGuire v. Eames*, 15 Blatchf. 312; *Kirby Bung Manuf. Co. v. White*, 1 Fed. R. 604.

¹² See *Pierpont v. Fowle*, 2 W. & M. 23, 36.

¹³ *Judge Hall in Muscan Hair Manufacturing Co. v. American Hair Manufacturing Co.*, 1 Fisher Pat. Cas. 320, 325.

introduced into public use in the United States for more than two years prior to the application upon which the patent was issued.¹⁴ After the expiration of a patent an injunction may issue to prevent the use of a machine made while the patent was in force; and an injunction previously issued will, until dissolved by order, remain in force so as still to forbid such a use.¹⁵ But a bill praying for such an injunction must allege either that the defendant is using machines manufactured during the term of the patent and in violation of it, or that the plaintiff has cause to fear such a use.¹⁶ An injunction against the manufacture or sale of articles in violation of a patent right is violated by their sale or manufacture within the United States, but beyond the jurisdiction of the court.¹⁷ "In deciding whether a given complainant has made out a *prima facie* case for a preliminary injunction to restrain infringement of a patent, the judge is guided by the presence or absence of two presumptions and one certainty. Those presumptions relate to the validity of the patent and to the defendant's infringement thereof, and that certainty relates to the complainant's title thereto. If that certainty or either of those presumptions are absent in a given case, no preliminary injunction will be granted; but such a writ will not be granted where they are all present, unless the defendant interposes some good defence to the motion, or unless the court takes a bond from the defendant instead of subjecting him to an injunction."¹⁸

§ 217. **Injunctions to restrain the Infringement of Copyrights.** — The Revised Statutes authorize injunctions to prevent the infringement of copyrights, as follows: "The circuit courts, and district courts having the jurisdiction of circuit courts, shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable."¹ This statute is, however, merely declaratory of

¹⁴ *Hill v. Thompson*, 3 Meriv. 622; *Sturz v. De La Rue*, 5 Russ. 322, 329; *Sullivan v. Redfield*, 1 Paine, 441; U. S. R. S. §§ 4886, 4887.

¹⁵ *American Diamond Rock Boring Co. v. Rutland Marble Co.*, 2 Fed. R. 356. But see *American Cable Ry. Co. v. Chicago City Ry. Co.*, 41 Fed. R. 522; *Westing-*

house v. Carpenter, 43 Fed. R. 894; *infra*, § 230.

¹⁶ *American Diamond Rock Boring Co. v. Rutland Marble Co.*, 2 Fed. R. 355.

¹⁷ *Macaulay v. White Sewing Machine Co.*, 9 Fed. R. 698.

¹⁸ *Walker on Patents*, § 665.

§ 217. ¹ U. S. R. S. § 4970.

the previous rule in equity which, it was said by Lord Eldon, was "founded upon this; that the law does not give a complete remedy to those whose literary property is invaded; for if publication after publication is to be made a distinct cause of action, the remedy would soon become worse than the disease. This court, therefore, interposes by injunction; but not in cases where an action cannot be maintained."² The rules regulating the issue of injunctions to prevent the infringement of copyrights are in general similar to those regulating the issue of injunctions restraining the infringement of patents. The plaintiff must show a clear title to his copyright, and an infringement or threatened infringement by the defendant.³ The injunction will be denied if the defendant shows that the plaintiff has consented to his infringement, or has been guilty of unreasonable delay after he learned that it had occurred or was threatened.⁴ How long a time must have elapsed to bar the plaintiff's right to an injunction has not been definitely settled. It has been held in England, however, that an injunction may be obtained after the copyright has been infringed to the plaintiff's knowledge during four years.⁵ Moreover, delay will not prejudice him, if solely caused by his waiting until the result of litigation, whether prosecuted by himself or others, to settle a doubtful question of law involving the validity of his title.⁶ As has been said, an injunction will not be granted unless the plaintiff shows a plain title to the copyright which he claims; but "the copyright is *prima facie* evidence that he is the author, and the burden of proof is upon the defendant to show the contrary,"⁷ or that, for some other reason, there is a defect in the title claimed.⁸ And the court will protect an equitable title against infringement unless the defendant possesses superior equities to those of the complainant.⁹ The complainant is not obliged to prove damage

² *Lawrence v. Smith*, Jacob, 471, 472.

³ *Chase v. Sanborn*, 6 Off. Gaz. 932; *Parkinson v. Laselle*, 3 Saw. 339; *Lawrence v. Dana*, 4 Cliff. 1; *Yuengling v. Seale*, 12 Fed. R. 97; *Drone on Copyright*, 9th ed. pp. 156-543.

⁴ *Rundell v. Murray*, Jacob, 311; *Saunders v. Smith*, 3 Myl. & Cr. 711; *Chappell v. Sheard*, 1 Jur. N. S. 996; *Tins v. Lee*, 1 Hem. & M. 747; *Keene v. Clarke*, 5 Robertson (N. Y.), 38, 66,

67; *Miller v. McElroy*, 1 Am. Law Reg. 198.

⁵ *Hogg v. Scott*, L. R. 18 Eq. 444, 454; *Drone on Copyright*, 504, 512.

⁶ *Buxton v. James*, 5 De G. & Sm. 80; *Rumford Chemical Works v. Vice*, 14 Blatchf. 179.

⁷ Chief Justice Tancv in *Reed v. Carusi*, Tancv, 72, 74.

⁸ *Drone on Copyright*, 399; *Story's Eq. Jur.* § 936, note 6.

⁹ *Little v. Gould*, 2 Blatchf. 165.

from the breach of copyright.¹⁰ If there is any doubt concerning the infringement, and its ascertainment will necessitate the examination of a great deal of matter, the court, in this country, usually directs a reference to a master to hear testimony and state the facts, together with his opinion for its consideration, before granting an injunction.¹¹ Such a reference is usually ordered before the final hearing, but may be at the decree.¹² In England, however, laborious examinations have frequently been made by the judges themselves, unassisted, except by counsel.¹³ Instead of a reference, an issue at law may be directed.¹⁴ The plaintiff need not specify in either his bill or his affidavit the parts of the defendant's publication which he thinks have been taken from his work. A general allegation of infringement accompanied by a verification by affidavit of the two works is sufficient.¹⁵ The practice has been that, "when the injunction has been moved for, the two works have been brought into court, and the counsel have pointed out to the court the passages which they rely upon as showing the piracy."¹⁶ Clearer proof and a stronger case than would be sufficient to entitle a plaintiff to an injunction after the hearing is often required before he can obtain an interlocutory injunction.¹⁷ The difficulty of accurately determining the damages resulting from an unauthorized publication of his work will often have weight in leading the court to grant a preliminary injunction, when otherwise it might refuse one.¹⁸ But, on the other hand, the court will often refuse an injunction before the hearing, when it is plain that the defendant would suffer more injury from being obliged to discontinue the publication than will result to the plaintiff from his continuing it.¹⁹ It has been held in England that if a work is libellous, im-

¹⁰ *Reed v. Holliday*, 19 Fed. R. 325, 327.

¹¹ *Folsom v. Marsh*, 2 Story, 100; *Webb v. Powers*, 2 W. & M. 497; *Story v. Derby*, 4 McLean, 160; *Greene v. Bishop*, 1 Cliff. 186; *Lawrence v. Dana*, 4 Cliff. 1; *Drone on Copyright*, 513. But see *Smith v. Johnson*, 4 Blatchf. 252.

¹² *Lawrence v. Dana*, 4 Cliff. 1; *Drone on Copyright*, 513.

¹³ *Lewis v. Fullarton*, 2 Beav. 6; *Murray v. Bogue*, 1 Drew. 353; *Jarrold v. Houlston*, 3 Kay & J. 708; *Pike v. Nicholas*, L. R. 5 Ch. 251; *Drone on Copyright*, 513.

¹⁴ *Jollie v. Jaques*, 1 Blatchf. 618.

¹⁵ *Farmer v. Calvert Lithographing Co.*, 1 Flippin, 228, 235; *Sweet v. Maugham*, 11 Simons, 51; *Drone on Copyright*, 513.

¹⁶ *Sweet v. Maugham*, 11 Simons, 51, 53.

¹⁷ *Johnson v. Wyatt*, 2 De G. J. & S. 18; *Drone on Copyright*, 517, 518.

¹⁸ *Matthewson v. Stockdale*, 12 Ves. 270; *Wilson v. Luke*, 1 Victorian Law Rep. 127; *Prince Albert v. Strange*, 1 Mac. & G. 25, 46; *Little v. Gould*, 2 Blatchf. 165; *Drone on Copyright*, 516-519.

¹⁹ *Spottiswoode v. Clarke*, 2 Phil. 154.

moral, or blasphemous, which last named term would include one "which impugned the doctrines of the immateriality and immortality of the soul,"²⁰ there can be no copyright therein, and a piratical edition thereof will not be enjoined.²¹ These decisions, however, one of which stigmatized as unworthy of protection Byron's "Cain,"²² have been severely criticised,²³ and it is not likely that they would be fully sustained if the question should be raised in the United States; although in a case in the Federal courts Judge Deady assigned as one among several reasons for refusing to enjoin an unauthorized representation of "The Black Crook," that it "only attracts attention as it panders to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person."²⁴ The injunction forbids the publication of only so much of the defendant's work as infringes upon the copyright of the plaintiff.²⁵

§ 218. Injunctions to restrain the Unlawful Use of Trade-marks.

—Injunctions to restrain the use of trade-marks by others than their owners are granted by courts of equity, it has been said, partly to prevent the fraud upon the public which would otherwise be perpetrated, and partly on account of the difficulty of estimating the injury which would be caused the owner of a trade-mark from its improper use.¹ The former ground of the interference of the court has, however, been expressly repudiated by a great judge, Lord Westbury, who said, when Lord Chancellor, in delivering the judgment in a leading case: "Imposition upon the public becomes the test of the property in the trade-mark having been invaded and injured, but not the ground on which the Court rests its jurisdiction."² "Trade-marks are

Cox v. Land & Water Journal Co., L. R. 9 Eq. 224; *Lodge v. Stoddart*, 9 Reporter, 137. But see *Emerson v. Davies*, 3 Story, 768.

²⁰ *Lawrence v. Smith, Jacob*, 471.

²¹ *Waleat v. Walker*, 7 Ves. 1; *Stockdale v. Onwhyn*, 5 Barn. & Cr. 173; *Murray v. Benbow*, 6 Petersd. Abr. 559; *Lawrence v. Smith, Jacob*, 471; *Southey v. Sherwood*, 2 Meriv. 435. But see *Burnett v. Chetwood*, 2 Meriv. 441.

²² *Murray v. Benbow*, 6 Petersd. Abr. 559.

²³ Campbell's Lives of the Lord Chancellors, ch. cxxiii.; Drone on Copyright, 181-196.

²⁴ Judge Deady in *Martinetti v. Maguire*, 1 Deady, 216, 223.

²⁵ *Webb v. Powers*, 2 W. & M. 497; *Story v. Holcombe*, 4 McLean, 306; *Farmer v. Elstner*, 33 Fed. R. 494.

§ 218. ¹ *Perry v. Truett*, 6 Beav. 66, 73; *Croft v. Day*, 7 Beav. 84; *Leather Cloth Co. v. The American Leather Cloth Co.*, 10 Jur. (n. s.) 81; *Walton v. Crowley*, 3 Blatchf. 440; *Shaw Stocking Co. v. Mack*, 12 Fed. R. 707.

² *The Leather Cloth Co. v. The American Leather Cloth Co.*, 10 Jur. (n. s.) 81. But see the language of Judge Coxe in *Shaw Stocking Co. v. Mack*, 12 Fed. R. 707, 710.

of two kinds. They may consist of pictures or symbols or a peculiar form and fashion of label, or simply of a word or words, which, in whatever form printed or represented, continue to be the distinguishing mark of the manufacturer who has appropriated it or them, and the name by which his products are known and dealt in.”³ “Where the trade-mark consists of a picture or symbol, or in any peculiarity in the appearance of the label, the imitation must be such as to amount to a false representation, liable to deceive the public, and enable the imitator to pass off his goods as those of the person whose trade-mark is imitated. And when there is such an absence of resemblance that ordinary attention would enable customers to discriminate between the trade-marks of different parties, the court will not interfere.”⁴ “But where the trade-mark consists of a word, it may be used by the manufacturer who has appropriated it, in any style of print, or in any form of label, and its use by another is unlawful. The statute” of New York “requires only that the imitation should be either the same to the eye, or in sound to the ear, as the genuine trade-mark, and this accords with the authorities.”⁵ “To make an exclusive right to use a name or symbol as a trade-mark, such use must be new; if ever before used as applicable to a like article, it cannot be exclusively appropriated. If the article is known to commerce in general, by the term claimed, as a trade-mark, the claim is ill-founded. If the term employed indicates the nature, kind, or quality of the article, instead of showing its origin, an exclusive right to its use is not maintainable.”⁶ In accordance with the maxim that he who seeks equity must come with clean hands, it is well established that, if the trade-mark for which protection is sought contains representations calculated to deceive the public, an injunction will be denied the plaintiff.⁷ An act of Congress allowing suits to enjoin the use of trade-marks to be brought in a Federal court against a citizen of the same State as the complainant, was held unconstitutional.⁸

³ Judge Rapallo in *Hier v. Abrahams*, 82 N. Y. 519, 523.

⁴ Judge Rapallo in *Hier v. Abrahams*, 82 N. Y. 519, 523.

⁵ Judge Rapallo in *Hier v. Abrahams*, 82 N. Y. 519, 524.

⁶ *Van Beil v. Prescott (The Rye & Rock Case)*, 82 N. Y. 630.

⁷ *Leather Cloth Co. v. The American Leather Cloth Co.*, 11 H. L. C. 523; s. c. in a lower court, 10 Jur. (N. S.) 81; *Fowle v. Spear*, 7 Penn. L. J. 176; *Heath v. Wright*, 3 Wall. Jr. 141; *Ginter v. Kinney Tobacco Co.*, 12 Fed. R. 782.

⁸ *Trade-Mark Cases*, 100 U. S. 82.

A subsequent act of Congress gives the Federal courts jurisdiction of such a suit when the plaintiff has registered his trade-mark for use in foreign commerce or commerce with the Indian tribes, and the defendant has used such registered trade-mark in such commerce.⁹

§ 219. **Injunctions to prevent the Opening of Letters.** — In England an injunction has been issued to prevent the tenants of a building formerly occupied by the members of another firm from opening letters addressed to the latter.¹

§ 220. **Injunctions to compel the Performance or prevent the Breach of Contracts not affecting Land.** — The performance of a contract not affecting lands will be enforced in equity by means of an injunction when, and only when, a judgment for damages would be no adequate remedy for its breach;¹ and it does not require a purely personal act which it would be impossible for the court to enforce.² The inadequacy of the remedy at law which will entitle one to specific performance of a contract may, it has been held, be proved by the fact that the damages in money cannot be ascertained.³ In some cases an injunction may be obtained to restrain a defendant from violating a negative promise contained in a contract, although the court has no power specifically to enforce the affirmative promises contained therein. Thus, when opera singers had contracted to sing at the plaintiffs' theatre and nowhere else, injunctions have been granted to restrain them from singing in rival establishments, although they could not be compelled to sing for the plaintiffs.⁴ The rule has been thus stated by Judge Lowell: "I think the fair result of the later cases may be thus expressed: If the case is one in which the negative remedy of injunction will do substantial justice between the parties, by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the

⁹ 21 Stat. at L. 502 (1 Supp. U. S. R. S. 606); *Graveley v. Graveley*, 42 Fed. R. 264.

§ 219. ¹ *Scheile v. Brakell*, 11 W. R. 795.

§ 220. ¹ *Buxton v. Lister*, 3 Atk. 383; *Robinson v. Cathcart*, 2 Cranch C. C. 590; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 399; *Very v. Levy*, 13 How. 345.

² *Clarke v. Price*, 2 Wilson Ch. Cases, 157; *Mair v. Himalaya Tea Co.*, L. R. 1 Eq. 411.

³ *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Sullivan v. Tuck*, 1 Md. Ch. 59; *Finley v. Aiken*, 1 Grant's Cases (Pa.), 83; *Bispham's Eq.* § 369.

⁴ *Lumley v. Wagner*, 1 De G., M. & G. 601; *McCaull v. Braham*, 16 Fed. R. 37.

contract, although it may be unable to enforce a specific performance of it.”⁵ But where the affirmative promise cannot be specifically enforced, the court will not import into it a negative covenant, neither expressly nor by a fair implication contained therein.⁶

§ 221. **Injunctions to compel the Delivery of Personal Property tortiously withheld.** — Under very extraordinary circumstances, equity will interfere to compel by injunction the delivery or return of letters, documents, or other articles of such a unique character that it would be impossible to replace them, when they are tortiously withheld from their rightful owners.¹

§ 222. **Injunctions authorized by Statute.** — The statutes of the United States also authorize an injunction in the following cases, besides those arising from infringements of patents and copyrights: “Any person who considers himself aggrieved by any warrant of distress issued under the” provisions of the statutes authorizing one to be issued by the Solicitor of the Treasury against an officer in default for not accounting for and paying over public money received by him, “may prefer a bill of complaint to any district judge of the United States, setting forth therein the nature and extent of the injury of which he complains; and thereupon the judge may grant an injunction to stay proceedings on such warrant altogether, or for so much thereof as the nature of the case requires. But no injunction shall issue till the party applying for it gives bond with sufficient security, in a sum to be prescribed by the judge, for the performance of such judgment as may be awarded against him; nor shall the issuing of such injunction in any manner impair the lien produced by the issuing of the warrant. And the same proceedings shall be had in such injunction as in other cases, except that no answer shall be necessary on the part of the United States: and if, upon dissolving the injunction, it appears to the satisfaction of the judge that the application for the injunction was merely

⁵ *Singer Co. v. Union Co.*, 1 Holmes, 253, 258. See also *Goddard v. Wilde*, 17 Fed. R. 845; *W. U. Tel. Co. v. Union Pacific Ry. Co.*, 3 Fed. R. 423; *W. U. Tel. Co. v. St. Joseph & W. Ry. Co.*, 3 Fed. R. 430.

⁶ *Clarke v. Price*, 2 Wilson Ch. C. 157; *Pickering v. Bishop of Ely*, 2 Y. & C. Ch. C. 249; *Johnson v. Shrewsbury &*

Birmingham Ry. Co., 3 De G., M. & G. 914; *Bispham's Eq.* § 464; *Kerr on Injunctions*, 524.

§ 221. ¹ *Pusey v. Pusey*, 1 Vern. 273; *Duke of Somerset v. Cookson*, 3 P. Wms. 389; *Clarke v. White*, 12 Pet. 178; *Prince Albert v. Strange*, 1 Macn. & G. 25, 42; *McGowin v. Remington*, 12 Pa. St. 56.

for delay, the judge may add to the lawful interest assessed on all sums found due against the complainant such damages as, with such lawful interest, shall not exceed the rate of ten per centum a year. Such injunction may be granted or dissolved by the district judge either in or out of court.”¹ “When the district judge refuses to grant an injunction to stay proceedings on a distress warrant, as aforesaid, or dissolves such injunction after it is granted, any person who considers himself aggrieved by the decision in the premises may lay before the circuit justice, or circuit judge of the circuit within which such district lies, a copy of the proceeding had before the district judge; and thereupon the circuit justice or circuit judge may grant an injunction, or permit an appeal, as the case may be, if, in his opinion, the equity of the case requires it. The same proceedings, subject to the same conditions, shall be had upon such injunction in the circuit court as are prescribed in the district court.”² “Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven” of the Revised Statutes of the United States, “apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.”³ A district attorney of the United States acting under the direction of the Attorney-General may upon a petition obtain an injunction to restrain a contract, combination in the form of a trust or otherwise, or a conspiracy in restraint of trade or commerce, or a monopoly of any part of trade or commerce among the several States or with foreign nations.⁴ Compliance with the

§ 222. ¹ U. S. R. S. § 3636.

² U. S. R. S. § 3637.

³ U. S. R. S. § 5237.

⁴ 26 St. at L. ch. 647, p. 209.

Inter-State Commerce Act may also in certain cases be compelled by an injunction.⁵

§ 223. **When Injunctions will not Issue.** — As a general rule, it may be stated that an injunction will not issue at the prayer of one who will suffer no pecuniary injury from the act which he wishes to prevent.¹ Thus, one will not be granted at the suit of a State to prevent the invasion of a purely political right;² or of adjacent property owners and church members to prevent a railroad from outraging their religious feelings by running cars upon Sunday;³ nor at the suit of minister of the gospel to prevent the use of his building for theatrical purposes, under a lease the validity of which he disputes.⁴ The Emperor of Austria and King of Hungary, however, was allowed an injunction to prevent Kossuth and his associates from manufacturing in England paper currency not purporting to be issued by imperial authority, intended for circulation in Hungary, upon the ground that his property rights were thereby injured.⁵ An injunction will not issue to prevent an injury which is not actually threatened to the complainant.⁶ Thus an injunction will not be granted to prevent an injury to a navigable stream, at the suit of an individual who is not engaged in navigating the same;⁷ nor, at the suit of a coupon holder who is not liable to the payment of taxes to a State, to prevent the State officers from refusing to receive his coupons, when tendered by others to whom he has agreed to assign them for the payment of their taxes, in pursuance of a contract made by the State with its creditors and their successors.⁸ "No court sits to determine questions of law *in thesi*."⁹ A threat of irreparable injury to a right actually enjoyed and exercised by the complainant, or acts indicating a preparation to commit such a wrong, are, however, always a ground for the issue of an injunction.¹⁰ And after a defendant has once infringed a patent

⁵ 24 St. at L. 380; 25 St. at L. 855; Interstate Commerce Commission v. Baltimore & O. R. Co., 43 Fed. R. 37.

§ 223. ¹ High on Injunctions, § 20.

² Georgia v. Stanton, 6 Wall. 50.

³ Sparkaw v. Union P. R. R. Co., 54 Pa. St. 401.

⁴ Bodwell v. Crawford, 26 Kan. 292.

⁵ Emperor of Austria v. Day, 2 Giff 628;

s. c. on appeal, 3 De G., F. & J. 217.

⁶ Slessinger v. Buckingham, 17 Fed. R. 454.

⁷ Spooner v. McConnell, 1 McLean, 337. See also Mason v. Rollins, 2 Biss. 99. Compare Works v. Junction R. R., 5 McLean, 425.

⁸ Virginia Coupon Cases, Marye v. Parsons, 114 U. S. 325.

⁹ Mr. Justice Matthews in Virginia Coupon Cases, Marye v. Parsons, 114 U. S. 325, 330.

¹⁰ St. Louis v. Knapp Co., 104 U. S. 658; Sherman v. Nutt, 35 Fed. R. 149; Butz Thermo-Electric Regulator Co. v.

owned by the plaintiff, it seems that the court will usually enjoin him from doing so in the future, even though he swears that he has no intention of doing so again; unless in addition to so swearing he shows that he has paid all damages occasioned by his infringement, and has desisted from it.¹¹ The Circuit Court for the Southern District of New York has refused to grant a preliminary injunction to restrain an obstruction to navigation in a navigable channel coming up from the Bay of New York, caused by a structure projecting from the New Jersey shore.¹² An injunction cannot be issued against the United States;¹³ nor against an officer to interfere with the exercise of his discretion;¹⁴ nor, it has been suggested, against an officer of the United States to prevent the infringement of a patent by him while in the exercise of his official duties.¹⁵ The Revised Statutes provide that "No suit for the purpose of restraining the assessment or collection of any tax" imposed by the United States for purposes of internal revenue, "shall be maintained in any court."¹⁶ Under this provision, it has been held that wherever a tax is imposed by a person in office having authority over the assessment of taxes for the United States, and acting under color of a statute, no injunction will be issued to restrain its collection, no matter how erroneous the assessment may be, and although the person against whom the assessment is made does not own the property taxed.¹⁷ "It is sufficient that a statute has authorized the assessor to entertain the general subject of taxation: that it was in fact entertained, and a judgment, lawful or unlawful, was rendered concerning it."¹⁸ It seems that the unconstitutionality of the statute imposing the tax will not

Jacobs Electric Co., 36 Fed. R. 191; *McArthur v. Kelly*, 5 Ohio, 139; *Frearson v. Loe*, L. R. 9 Ch. D. 48. See also *Piek v. Chicago & N. W. Ry. Co.*, 6 Biss. 177.

¹¹ *Jenkins v. Greenwald*, 1 Bond, 126; s. c. 2 Fisher, 37; *Sickels v. Mitchell*, 3 Blatchf. 548; *Poppenhusen v. New York Gutta Percha Comb Co.*, 4 Blatchf. 184; *Celluloid Manuf. Co. v. Arlington Manuf. Co.*, 34 Fed. R. 324.

¹² *Atlantic Dredging Co. v. Bergen Neck Ry. Co.*, 44 Fed. R. 208.

¹³ *United States v. McLemore*, 4 How. 286; *Hill v. United States*, 9 How. 386.

¹⁴ *Mississippi v. Johnson*, 4 Wall. 475;

Walker v. Smith, 21 How. 579; *McElrath v. McIntosh*, 1 Law Repr. (N. S.) 399.

¹⁵ *James v. Campbell*, 104 U. S. 356; *Hollister v. Benedict & B. Manaf. Co.*, 113 U. S. 59, 67.

¹⁶ U. S. R. S. § 3224.

¹⁷ *Kensett v. Stivers*, 10 Fed. R. 517; *Pullan v. Kinsinger*, 2 Abb. U. S. 94; *Howland v. Soule, Deady*, 413; *Delaware R. Co. v. Prettyman*, 17 Int. Rev. Rec. 99; *Alkan v. Bean*, 23 Int. Rev. Rec. 351; *Kinsinger v. Bean*, 7 Biss. 60; *United States v. Black*, 11 Blatchf. 538. But see *Frayser v. Russell*, 3 Hughes, 227.

¹⁸ *Emmons, J.*, in *Pullan v. Kinsinger*, 2 Abb. U. S. 94, 99.

authorize the issue of an injunction.¹⁹ It has been held that an injunction will not be granted to restrain the Commissioner of Patents from issuing letters-patent.²⁰ An injunction cannot be issued against a State at the suit of a citizen of another State or of a foreign State.²¹ Nor can a mandatory injunction be issued against an officer of a State so as to compel the action of the State against its expressed will.²² But an officer of a State may be enjoined from an invasion of private rights which would cause irreparable injury, when about to act under an unconstitutional act of the legislature of the State.²³ As has been said before, an injunction will not ordinarily be granted to stay proceedings in a State court.²⁴ In England, a person may be restrained from petitioning or applying to the legislature in order to procure the passage of an act relating solely to private interests, provided he be under an express or implied agreement not to do so, or his doing so would amount to a breach of trust.²⁵ This doctrine has, however, never been upheld in the United States, and in a well-considered case in New Jersey was expressly repudiated.²⁶ The early English cases held that an injunction would not issue to restrain the publication of a slander or libel, no matter how injurious it might be to the complainant.²⁷ Since the passage of the Judicature Act, however, such injunctions have been granted there in order to protect rights of property.²⁸ An injunction was denied when sought to prevent a defendant from advertising that a patent was void, and it appeared that he honestly believed it to be so, and published the statement for the sole purpose of protecting what he believed to be his rights.²⁹ Whether a Federal

¹⁹ *Robbins v. Freeland*, 11 Int. Rev. Rec. 28.

²¹ *Illingworth v. Atha*, 42 Fed. R. 141.

²¹ Eleventh Amendment of the Constitution.

²² *Louisiana v. Jumel*, 107 U. S. 711; *Antoni v. Greenhow*, 107 U. S. 769, 782-784; *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446.

²³ *Osborn v. Bank of the United States*, 9 Wheat. 738; *Davis v. Gray*, 16 Wall. 203; *Board of Liquidation v. McComb*, 92 U. S. 531; *Virginia Coupon Cases*, 114 U. S. 269. See, however, *In re Ayers*, 123 U. S. 443.

²⁴ U. S. R. § 720; *supra*, § 211.

²⁵ *Ware v. The Grand Junction Water*

Works Co., 2 Russ. & M. 470; *The Stockton & H. Ry. Co. v. The Leeds & Th. Ry. Co.*, 2 Phil. 656; *Heathcote v. North Staffordshire Ry. Co.*, 2 Mac. & G. 100.

²⁶ *Story v. The Jersey City & Bergen Point Plank Road Co.*, 1 C. E. Green (16 N. J. Eq.) 13.

²⁷ *Prudential Assur. Co. v. Knott*, L. R. 10 Ch. 142; *Clark v. Freeman*, 11 Beav. 112. See also *Brandreth v. Lance*, 8 Paige (N. Y.) 24.

²⁸ *Thorley's Cattle Food Co. v. Massam*, L. R. 6 Ch. D. 582; *Saxby v. Easterbrook*, L. R. 3 C. P. D. 339; *Wren v. Weild*, L. R. 4 Q. B. 730.

²⁹ *Halsey v. Brotherhood*, 45 L. T. S. S. 640; *Celluloid Manuf. Co. v. Goodyear*

court will in any case grant an injunction against the publication of a libel is a disputed question.³⁰ It has been held that an injunction may be granted against the publication and circulation of posters and handbills in aid of a boycott.³¹ An injunction will not issue to assist in the maintenance of a monopoly injurious to public policy;³² nor in any other case when its operation would be repugnant to public policy.³³ An injunction will not be issued when the moving party has a plain, adequate, and complete remedy at law.³⁴

§ 224. **Distinction between the Judicial Writ and the Writ Remedial.**—Injunctions were formerly either judicial writs or writs remedial. A judicial writ was a direction to yield up, to quiet, or to continue the possession of lands, and is said to be in the nature of a writ of execution.¹ It was issued in aid of, and only after a final decree in equity; and, in extraordinary circumstances, in aid of a judgment at law.² Under the equity rules, however, it is never necessary; and it had previously fallen into disuse in England. All other injunctions are writs remedial.

§ 225. **Distinction between Mandatory and Prohibitory Injunctions.**—Injunctions are either mandatory or prohibitory. A mandatory injunction is one that commands a defendant to perform a certain act or acts; a prohibitory injunction, one that forbids a defendant's doing a certain act or acts. Mandatory are far less common than are prohibitory injunctions. Those most frequently issued have been such as commanded a defendant to

Dental Vulcanite Co., 13 Blatchf. 375; *Pentlarge v. Pentlarge*, 14 Repr. 579.

³⁰ Held that it can, in *Ide v. Ball Engine Co.*, 31 Fed. R. 901, U. S. C. C., S. D. Illinois, by Allen J.; *Emack v. Kane*, 34 Fed. R. 46, U. S. C. C., N. D. Illinois, by Blodgett, J. Cf. *Palmer v. Travers*, 20 Fed. R. 501, U. S. C. C., S. D. N. Y., by Wheeler, J.; *Celluloid Manuf. Co. v. Goodyear D. V. Co.*, 13 Blatchf. 375, U. S. C. C., S. D. N. Y., by Hunt, J. Held that it cannot, in *Kidd v. Horry*, 23 Fed. R. 773, U. S. C. C., E. D. Pa., by Bradley and McKennan, JJ.; *Baltimore Car-Wheel Co. v. Bemis*, 29 Fed. R. 95, U. S. C. C., D. Mass., by Colt and Carpenter, JJ.; *Fougeres v. Murbarger*, 44 Fed. R. 292, U. S. C. C., D. Indiana, by Woods, J.; *International Tooth-Crown Co. v. Carmichael*, 44 Fed. R. 350, 351, U. S. C.

C., E. D. Wis., by Jenkins J. See *Francis v. Flinn*, 118 U. S. 385; *Kelley v. Ypsilanti*, D. S. M. Co., 44 Fed. R. 19, 23.

³¹ *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. R. 135.

³² *Pullman Palace Car Co. v. Texas & Pacific Ry. Co.*, 11 Fed. R. 625; s. c. 4 Woods, 317; *Foll's Appeal*, 91 Pa. St. 484, 488.

³³ *Bryant v. W. U. Tel. Co.*, 17 Fed. R. 825; *Blake v. Greenwood Cemetery*, 14 Blatchf. 342; *Denehey v. Harrisburg*, 44 Pearson (Pa.), 330, 334.

³⁴ U. S. R. S. § 723.

§ 224. ¹ Eden on Injunctions, chs. 1, and xvii., pp. 1-2, 261-262; Beames' Orders, 8, 16.

² Boulton v. Blunt, Cary, 72; Eden on Injunctions, 262.

abate a nuisance,¹ or to deliver the possession of land.² They have also been granted to compel the return of letters and other documents,³ the delivery of personal property whose loss could not be compensated in damages,⁴ the giving of collateral security in obedience to a contract,⁵ the making of a policy of insurance,⁶ the stopping and receiving freight by a railroad company at a particular place,⁷ and the performance of a contract by one railroad company to send freight over the lines of another railroad.⁸ The court, in a case involving the constitutionality of certain Kentucky statutes, refused a mandatory injunction compelling a distribution of the money raised by a tax upon white people partly among public schools for colored children, in the absence of any contract right or legislative authority for such a distribution; but it granted "a decree enjoining and restraining the proper parties from applying to the use of the schools organized for and at which white children only are allowed to attend, one-fourth of the money heretofore, or which may be hereafter, collected under the authority of the act of 1871 and its amendments."⁹ Mandatory injunctions are usually issued in a negative form, restraining a defendant from desisting or refusing to do an act.¹⁰ They are very rarely granted upon an interlocutory motion.¹¹

§ 225. ¹ *Lane v. Newdigate*, 10 Ves. 192; *Robinson v. Lord Byron*, 1 Bro. C.C. 588; *Hervey v. Smith*, 1 K. & J. 389; *Rankin v. Huskisson*, 4 Simons, 13; *Bickett v. Morris*, L. R. 1 H. L. Sc. 47; *Cole Silver Mining Co. v. Virginia & G. H. Water Co.*, 1 Saw. 470.

² *Hepburn v. Auld*, 5 Cranch, 262; *Hepburn v. Dunlop*, 1 Wheat. 179; *Findlay v. Hinde*, 1 Pet. 241.

³ *Evitt v. Price*, 1 Simons, 483; *Seton on Decrees* (4th ed.), 179. See also *Clarke v. White*, 12 Pet. 178.

⁴ *Pusey v. Pusey*, 1 Vern. 273; *Duke of Somerset v. Cookson*, 3 P. Wms. 389; *Greatrex v. Greatrex*, 1 De G. & Sm. 692; *McGowin v. Remington*, 12 Pa. St. 56.

⁵ *Robinson v. Cathcart*, 2 Cranch C. C. 590.

⁶ *Union Mutual Ins. Co. v. Commercial Mut. Marine Ins. Co.*, 2 Curt. 524.

⁷ *Coe v. Louisville & Nashville R. R. Co.*, 3 Fed. R. 775; *McCoy v. Cincinnati, I., St. L. & C. R. Co.*, 13 Fed. R. 3.

⁸ *Chicago & A. Ry. Co. v. N. Y., L. E. & W. R. Co.*, 34 Fed. R. 516.

⁹ *Barr, J. in Claybrook v. City of Owensboro*, 23 Fed. R. 634, 636.

¹⁰ *Southern Express Co. v. St. Louis, Iron M., & Southern Ry. Co.*, 10 Fed. R. 210, 869; *Smith v. Smith*, L. R. 20 Eq. 500, 504; *Cole Silver Mining Co. v. Virginia & G. H. Water Co.*, 1 Saw. 470.

¹¹ *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.*, 13 Fed. R. 546; *McCauley v. Kellogg*, 2 Woods, 13; *Camblos v. The Philadelphia & R. R. Co.*, 9 Phila. (Pa.) 411; s. c. 4 Brewster (Pa.), 563; *Rogers Locomotive Works v. Erie Ry. Co.*, 5 C. E. Green (20 N. J. Eq.), 379. But see *Dinsmore v. Louisville, C. & L. Ry. Co.*, 2 Fed. R. 465; *Dinsmore v. Louisville, N. A. & C. R. R. Co.*, 3 Fed. R. 593; *Coe v. Louisville & Nashville R. R. Co.*, 3 Fed. R. 775; *Ormsby v. Union Pacific R. R. Co.*, 4 Fed. R. 706; *Texas Express Co. v. Texas & Pacific Ry. Co.*, 6 Fed. R. 426; *Chicago & A.*

§ 226. **Distinction between Provisional and Perpetual Injunctions.**—Provisional, also called preliminary or interlocutory, injunctions are such as are to continue until a certain time usually specified therein; for example, until the coming in of the defendant's answer, the hearing of the cause, the master's report, or the further order of the court.¹ Perpetual, also called final, injunctions are those which, as their name denotes, perpetually restrain the defendant from the same act or acts. Provisional injunctions may be granted at any time during the progress of a suit. Perpetual injunctions can never be granted except at the time of the entry of the decree.² The setting up of outstanding terms can, it has been said, only be restrained by a perpetual injunction.³ Mandatory injunctions also will very rarely be granted before a decree.⁴ "It is a rule of practice in the Circuit Courts of the United States not to allow an injunction to stay an ejectment suit until it can be investigated in equity, unless a judgment be entered therein."⁵

§ 227. **Distinction between Common and Special Injunctions.**—Injunctions were formerly of two kinds, common and special. Common injunctions were those which were granted, as of course, upon the defendant's default either in appearing or answering, and were only applicable to restrain proceedings at common law.¹ Special injunctions were those which were granted, not as a matter of course, but upon the special circumstances of the case as disclosed by the answer of the defendant or upon affidavits.² Common injunctions, although recognized by the equity rules,³ have, it has been held, been abolished by the Revised Statutes.⁴

Ry. Co. v. N. Y., L. E. & W. R. Co., 34 Fed. R. 516; *C. S. M. Co. v. V. & G. H. W. Co.*, 1 Saw. 685; *Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co.*, 34 Fed. R. 481.

§ 226. ¹ *Daniell's Ch. Pr.* (2d Am. ed.) 1870; *Eden on Injunctions*, ch. xv.

² *Daniell's Ch. Pr.* (2d Am. ed.) 1903; *Adams v. Crittenden*, 17 Federal Reporter, 42.

³ *Hydon v. Morgan*, 6 Ves. 293; *Byrne v. Byrne*, 2 Sch. & Lef. 537; *Barney v. Luckett*, 1 Sim. & S. 419; *Northey v. Pearce*, 1 Sim. & S. 420.

⁴ *Camblos v. The Philadelphia & R. R. Co.*, 9 Phila. (Pa.) 411; see 4 *Brewster* (Pa.), 563; *Rogers Locomotive*

& Machine Works v. Erie Ry. Co., 5 C. E. Green (N. J.) 379. But see *Dinsmore v. Louisville, C. & L. Ry. Co.*, 2 Fed. R. 465; *Coe v. Louisville & Nashville R. R. Co.*, 3 Fed. R. 775, and other cases cited under § 225.

⁵ *Billings, J.*, in *Heirs of Szywauski v. Zunts*, 20 Fed. R. 361, 363, citing *Turner v. American Bapt. Missionary Union*, 5 McLean, 344.

§ 227. ¹ *Daniell's Ch. Pr.* (2d Am. ed.) 1877.

² *Daniell's Ch. Pr.* (2d Am. ed.) 1833.

³ Rule 55.

⁴ *Perry v. Parker*, 1 W. & M. 280; *Lawrence v. Bowman*, 1 McAll. 419.

The learning upon the subject, which is very technical, seems now, therefore, useless, and will not be repeated here.⁵

§ 228. **Time and Place of Applications for Interlocutory Injunctions.** — An injunction may be obtained, at any time, as well in vacation as in term, and whether the court be sitting or not, at any place within which the judge granting it has jurisdiction, and at almost any stage of the cause.¹ In England it has been held, that, in a very extraordinary case, an injunction may be granted upon petition before the filing of a bill or the service of a subpoena;² and in the courts of the United States an injunction has been issued upon the filing of the bill and before service of the subpoena.³ An injunction will not usually be granted while a demurrer or plea to the bill is pending.⁴ But in cases of emergency, the court may order the sufficiency of such a pleading to be argued before the regular time for such a proceeding, together with the motion for the injunction;⁵ or even grant a stay-order without waiting for the argument.⁶ Should a motion be heard while a demurrer is on the file and undisposed of, it seems that upon the hearing of the motion the allegations in the bill will be considered as admitted.⁷ An application for an injunction has been refused because the bill had been referred for scandal.⁸

§ 229. **Injunctions not prayed for in the Bill.** — The English rule was that an injunction would not issue against a person not made a party to a bill specifically praying an injunction against him;¹ and the injunction had to be prayed for not only in the prayer for relief, but also in the prayer for process.² To this, however, there were four exceptional classes of cases. If the court had by its decree taken the distribution or control of property into its own hands, it would prevent injury thereto either by the parties litigant or others, although no injunction had been

⁵ See *Daniell's Ch. Pr.* (2d Am. ed.) 1811-1833.

§ 228. ¹ *Daniell's Ch. Pr.* (5th Am. ed.) 1663; *Kerr on Injunctions*, 543-545; *Bacon v. Jones*, 4 Myl. & Cr. 433.

² *Mayor of London v. Bolt*, 5 Ves. 129.

³ *Schermerhorn v. L'Espenasse*, 2 Dall. 369.

⁴ *Cousins v. Smith*, 13 Ves. 164; *Ketchum v. Driggs*, 6 McLean, 13; *Anon.*, 2 Atk. 113; *Daniell's Ch. Pr.* (5th Am. ed.) 1671.

⁵ *Anon v. Bridgewater Canal Co.*, 9 Simons, 378; *Daniell's Ch. Pr.* (5th Am. ed.) 1671.

⁶ *Wardle v. Claxton*, 9 Simons, 412; *Maltby v. Bobo*, 14 Blatchf. 53; *Fremont v. Merced Mining Co.*, 1 McAll. 267.

⁷ *Bayerque v. Cohen*, McAll. 113.

⁸ *Davenport v. Davenport*, 6 Madd. 251.

§ 229. ¹ *Daniell's Ch. Pr.* (5th Am. ed.) 1614-1617.

² *Wood v. Beadell*, 3 Simons, 273.

prayed by the bill.³ Thus, in a foreclosure suit, it would restrain waste by the mortgagor after a decree for an account;⁴ and after a decree for the administration of the assets of a dead man, it would enjoin a creditor not a party to the suit from proceeding at law against the testator's or intestate's estate to satisfy his individual claim, provided that the executor made an affidavit stating what assets he had in his hands, or had previously admitted their amount.⁵ If the suit were brought by a legatee, such a statement or admission was not indispensable.⁶ Secondly, an injunction was granted without a bill being filed, for the express purpose of preventing a plaintiff from suing both at law and in equity at the same time and for the same matter, and to compel him to make an election.⁷ Thirdly, an injunction could always be obtained to compel respect and enforce obedience to the decrees and orders of the court. Thus, publications which were disrespectful to the court, or which unfairly reported its proceedings, could be enjoined.⁸ So, too, an injunction could issue to restrain an action at law to recover damages for false imprisonment under process of contempt improperly issued;⁹ to compel compliance with the terms and spirit of a decree by one who had bought land under it;¹⁰ to compel compliance with his lease by the tenant of a receiver;¹¹ and to prevent an unauthorized action against a receiver.¹² And fourthly, there seems to be a class of cases not clearly defined in which the court granted an injunction, when without it "the whole object of the proceedings would be defeated," although it was not prayed for in the bill.¹³

§ 230. **Special Practice of the Federal Courts in the Issue of Injunctions.** — The following regulations control the practice in issuing injunctions in the Federal courts. "The prayer of the bill shall ask the special relief to which the plaintiff supposes

³ Daniell's Ch. Pr. (5th Am. ed.) 1614.

⁴ Wright v. Atkins, 1 V. & B. 313.

⁵ Daniell's Ch. Pr. (5th Am. ed.) 1617; Paxton v. Douglas, 8 Ves. 520; Thompson v. Brown, 4 J. Ch. (N. Y.) 619.

⁶ Ratcliffe v. Winch, 16 Beav. 576; Daniell's Ch. Pr. (5th Am. ed.) 1617.

⁷ Rogers v. Vosburgh, 4 J. Ch. (N. Y.) 84.

⁸ Anon., 2 Ves. Sen. 520; Brook v. Evans, 20 L. J. Ch. 616; Coleman v. West Hartlepool Ry. Co., 8 W. R. 734; Mack-

ett v. Commissioners of Herne Bay, 24 W. R. 845. But see U. S. R. S. § 725.

⁹ Frowd v. Lawrence, 1 J. & W. 655; Ex parte Clarke, 1 R. & M. 563; Daniell's Ch. Pr. 511.

¹⁰ Casamajor v. Strode, 1 Sim. & Stu. 381; Kerr on Injunctions, 543.

¹¹ Walton v. Johnson, 15 Simons, 352.

¹² Angel v. Smith, 9 Ves. 335.

¹³ Blomfield v. Eyre, 8 Beav. 250. See Shainwald v. Lewis, 6 Fed. R. 766.

himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.”¹ “Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance, and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice to such injunction.”² But special injunctions shall be grantable only upon due notice to the other party by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte* if the adverse party does not appear at the time and place ordered. In every case where an injunction — either the common injunction or a special injunction — is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.”³ “Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge.”⁴ “Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court, and by any judge of a circuit court in cases where they might be granted by such court. But no justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. And an injunction shall not be issued by a district judge, as one of the judges of a circuit court,” except when holding such court,⁵ “in any case where a party has had a reasonable time to apply to the circuit court for

§ 230. ¹ Rule 21. But see *Shainwald v. Lewis*, 6 Fed. R. 766.

² *Perry v. Parker*, 1 W. & M. 280.

³ Rule 55.

⁴ U. S. R. S. § 718. See *Yuengling v. Johnson*, 1 Hughes, 607; C. B. & Q. Ry. Co. v. B. C. R. & N. Ry. Co., 34 Fed. R. 481.

⁵ *Goodyear Dental Vulcanite Co. v. Folsom*, 3 Fed. R. 509.

the writ; nor shall any injunction so issued by a district judge continue longer than to the circuit court next ensuing, unless so ordered by the circuit court.”⁶ It has been held under the foregoing statutory provision that absence or illness of the circuit and district judges is such a disability as authorizes the circuit justice to hear and grant the application at a place outside of the circuit;⁷ and that, if the circuit justice as well as the circuit and district judges be absent from the circuit, the application may be heard and the writ granted by any justice of the Supreme Court in any part of the United States.⁸ A denial by the Circuit Court of an application to dissolve an injunction granted by a district judge may be treated as an order for its continuance.⁹ But if no order continuing it is made, such an injunction is dissolved without an order.¹⁰

In the Circuit Court for the Southern District of New York the rules provide as follows:—

“No motion for an injunction (except to stay waste) shall be heard unless a copy of the bill and of the depositions to be offered in its support shall be served on the adverse party, or his attorney, at least four days before motion made.”¹¹ “The defendant may show cause against the allowance of an injunction, either by plea, answer, or demurrer to the bill, or by parol exception to its legal sufficiency, or by deposition, disproving the equity on which the motion is founded.”¹² “Suppletory, or supporting, proofs may, at the discretion of the court, or judge, be offered by the complainant to rebut the cause shown by the defendant; but the reception of such additional proofs is not to permit the introduction of further proofs in opposition thereto by the defendant, previous to the final hearing upon the merits.”¹³ “Hereafter, on motions for an injunction, because of the infringement of a patent right, the complainant shall not be permitted to give evidence to rebut the cause shown by the defendant against the allowance thereof, other than to a denial that the defendant uses

⁶ U. S. R. S. § 719. See Dudley’s Case, 1 Penn. L. J. 302.

⁷ *Seales v. Jacksonville, P. & M. R. R. Co.*, 2 Woods, 621.

⁸ *United States v. Louisville & P. Canal Co.*, 4 Dill. 600.

⁹ *Parker v. Judges of Circuit Court*,

12 Wheat. 561. See *Gray v. Chicago, I. & N. R. R. Co.*, 1 Woolw. 63.

¹⁰ *Parker v. The Judges of Circuit Court*, 12 Wheat. 561; *Gray v. Chicago, I. & N. R. R. Co.*, 1 Woolw. 63.

¹¹ U. S. C. C., S. D. N. Y. Rule 105.

¹² U. S. C. C., S. D. N. Y. Rule 106.

¹³ U. S. C. C., S. D. N. Y. Rule 107.

the discovery or invention claimed by the complainant, or to a claim by the defendant that he acts under an assignment or license from the patentee, and on motions for injunctions to stay waste, only to a defence set up justifying the waste; and in neither case shall such suppletory or supporting proofs be received, unless the court, or one of the judges, on satisfactory cause shown, shall, by order previously made, allow the same to be given. And so much of rule 107 of the standing Rules in Equity of this court adopted April 28, 1838, as may be inconsistent herewith, is repealed. Motions for injunctions shall be brought on by the complainant on the day named in the notice, if the court is then in session; and in default thereof, the defendant may move that the notice be discharged for the term, with costs, unless further time is given, or the hearing is delayed by order of the court."¹⁴

§ 231. Notice of Application for Interlocutory Injunction. — As a general rule, notice of an application for an injunction must always be given to the person against whom the injunction is desired; but in very pressing cases, where the mischief sought to be prevented was serious, imminent, and irremediable, or where the mere act of giving notice to the defendant of the intention to make the application might have been of itself productive of the mischief apprehended, by inducing him to accelerate the act in order that it might be complete before the time for making the application should have arrived, the courts have always awarded injunctions without notice.¹ On an application for an injunction without notice, the plaintiff should state in his affidavit the time when he first learned of the threatened mischief,² if the injunction desired be to restrain the infringement of a patent that he believes that the person to whom the patent was issued was the original inventor thereof, or that the thing or process patented was new or had not been introduced into public use in the United States for more than two years prior to the application upon which the patent was issued,³ and every material circumstance

¹⁴ U. S. C. C., S. D. N. Y. Rule of May 18, 1846.

§ 231. ¹ Daniell's Ch. Pr. (5th Am. ed.) 1364; Kerr on Injunctions, 545; Wing v. Fairhaven, 8 Cushing (Mass.), 363; Schermerhorn v. L'Espenasse, 2 Dall. 360; Yuengling v. Johnson, 1 Hughes, 607.

² Calvert v. Gray, 2 Cooper's Ch. R. 171 n.

³ Hill v. Thompson, 3 Meriv. 622; Sturz v. De la Rue, 5 Russ. 322, 329; Sullivan v. Redfield, 1 Paine, 441. See also U. S. R. S. §§ 4886, 4887.

connected with the case, whether the same bears for or against his application.⁴ If his affidavit be defective in any of these particulars, according to the English practice, an injunction would not be issued, or if issued the order for it would be discharged.⁵ "The application for a special injunction is very much governed upon the same principles which govern insurances, matters which are said to require the utmost degree of good faith, '*uberrima fides*.' In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. So here, if the party applying for a special injunction abstains from stating facts which the court thinks are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the court to grant."⁶ In the absence of any local rule upon the subject, the practice in giving notice of an application for an injunction, and of proceeding at the time when the application is made, are the same when an injunction is asked for as upon any other interlocutory application. It has been said that an application for an interlocutory special injunction, during term and after the beginning of a suit and before answer, can only be made by motion: but that in vacation a judge may grant such an application upon petition.⁷ The usual practice is, however, to apply by motion. It has been held that a mandatory injunction can only be granted upon notice.⁸ It has been further held that the evidence which would prevent the issue of an interlocutory injunction will be sufficient to induce the court to dissolve one previously granted.⁹

§ 232. **Affidavits upon an Application for an Injunction.**—The affidavits upon which an injunction is sought are usually sworn

⁴ *Dalglish v. Jarvie*, 2 Macnaghten & Gordon, 231.

⁵ *Dalglish v. Jarvie*, 2 Macnaghten & Gordon, 231.

⁶ The Lord Commissioner, Mr. Baron Rolfe, in *Dalglish v. Jarvie*, 2 Mac. & G. 231, 243, 244.

⁷ Daniell's Ch. Pr. (5th Am. ed.) 1666; *Smith v. Clarke*, 2 Dick. 455; *Nichols v. Kearsly*, 2 Dick. 645.

⁸ *Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co.*, 34 Fed. R. 481.

⁹ *Cary v. Domestic Springbed Co.*, 26 Fed. R. 38.

to by the plaintiffs or one of them,¹ but may be sworn to by any person acquainted with the facts,² in which latter case the affidavit should, it seems, state a good reason for its not being sworn to by one of the plaintiffs.³ It is in general necessary that a plaintiff should swear positively to his title.⁴ An injunction has been refused when a plaintiff merely swore upon information and belief that he was a remainder-man under a settlement.⁵ Upon an application for an injunction to stay waste, he must set out his title with particularity. A statement "that the plaintiff was entitled to the fee-simple of the estate" has been held insufficient.⁶ It has been said that if fraud is relied upon as a basis for an injunction, it must be sworn to positively, and not merely upon information and belief.⁷ The plaintiff should also in the affidavits show some actual violation of his rights, or a sufficient ground to apprehend it.⁸ An injunction may be granted though the bill is not sworn to, provided that the accompanying affidavits show a proper case for it;⁹ but not unless a proper case is made out by the bill itself.¹⁰ If the defendant in his opposing affidavits set up as a defence new matter in avoidance of the case shown by the plaintiff, the latter may have leave to file further affidavits in rebuttal; but generally no subsequent affidavits can be filed by the defendant.¹¹ Rebutting affidavits may also be used to support any allegations of the bill denied in the answer except such as state the plaintiff's title to property affected by the litigation.¹² The authorities are conflicting as to whether or not the plaintiff's title, if denied in the answer, can be supported by re-

§ 232. ¹ Daniell's Ch. Pr. (5th Am. ed.) 1669.

² Lord Byron v. Johnston, 2 Meriv. 29; Brooks & Hardy v. O'Hara Bros., 8 Fed. R. 529.

³ Lord Byron v. Johnston, 2 Meriv. 29; Spalding v. Keely, 7 Simons, 377; Scotson v. Gaury, 1 Hare, 99; Kerr on Injunctions, 548.

⁴ Daniell's Ch. Pr. (5th Am. ed.) 1669.

⁵ Davis v. Leo, 6 Ves. 784.

⁶ Whitelegg v. Whitelegg, 1 Brown Ch. C. 57.

⁷ Brooks & Hardy v. O'Hara Bros., 8 Fed. R. 529.

⁸ Gibson v. Smith, 2 Atk. 182; Jackson v. Cator, 5 Ves. 688; Hanson v. Gardiner, 7 Ves. 305.

⁹ Smith v. Schwed, 6 Fed. R. 455.

¹⁰ Cooper v. Mattheys, 8 Law Rep. 413; Wilson v. Stolley, 4 McLean, 272; Leo v. Union Pacific Ry. Co., 17 Fed. R. 273; Land Co. of New Mexico v. Elkins, 20 Fed. R. 545; St. Louis Type Foundry v. Carter & G. P. Co., 31 Fed. R. 524.

¹¹ Day v. New England Car Spring Co., 3 Blatchf. 154. See Rule 107 and Rule of May, 1846, of U. S. C. C., S. D. N. Y., quoted *supra*, § 230.

¹² Brooks v. Bicknell, 3 McLean, 250; Farmer v. Calvert Lithographing Co., 1 Flippin, 228. See Rule 113 and Rule of May, 1846, of U. S. C. C., S. D. N. Y.

butting affidavits.¹³ Where an allegation in the bill is not denied in the answer, it is taken as admitted for the purposes of a motion for a preliminary injunction.¹⁴ Documentary proof, if of equal force with affidavits, can also be used in support or in opposition to a motion for an injunction.¹⁵ Upon the hearing of a motion for a preliminary injunction, the rules of evidence are applied less strictly than upon the final hearing of the cause; and consequently decrees entered in suits between strangers affecting the validity of a patent in question may be offered in evidence, in support of an application for a preliminary injunction, but not in support of an application for one that is to be perpetual.¹⁶ Hearsay evidence may also be used.¹⁷

§ 233. **Rules of Decision upon Applications for Interlocutory Injunctions.**—The issue of an interlocutory injunction is never a matter of right, but rests in the sound discretion of the court. In order to obtain one, the plaintiff must show either that there is no doubt of the wrongful nature of the act sought to be enjoined,¹ or that his own claims of right have been acquiesced in without question for a long period of time,² or that the injury which will result to himself from a refusal of the injunction will be very great, and that to the defendant from the issue thereof very slight.³ Otherwise, an interlocutory injunction will be denied him.⁴ In a suit under the act to protect trade and com-

¹³ Compare *Poor v. Carleton*, 3 Sumner, 70; *Goodyear v. Mullee*, 3 Fisher, 420; with *Farmer v. Calvert Lithographing Co.*, 1 Flippin, 228; *Parker v. Sears*, 1 Fisher Pat. Cas. 93; *United States v. Parrott*, 1 McAll. 271. See Rule 107 and Rule of May, 1846, of U. S. C. C., S. D. N. Y.

¹⁴ *Young v. Grundy*, 6 Cranch, 51. See § 146.

¹⁵ *Schiermerhorn v. L'Espenasse*, 2 Dall. 360.

¹⁶ *Buck v. Hermance*, 1 Blatchf. 322; *Matthews v. Ironclad Manuf. Co.*, 19 Fed. R. 321.

¹⁷ *Casey v. Cincinnati Typographical Union No. 3*, 45 Fed. R. 135, 147; where Judge Sage quotes this passage with approval.

§ 233. ¹ *Minturn v. Larue*, 1 McAll. 370; *Buchanan v. Howland*, 2 Fisher, 341; *Doughty v. West*, 2 Fisher, 553.

² *Varick v. Mayor of New York*, 4 J. Ch. (N. Y.) 53; *Kirby Bung Manuf. Co. v. White*, 1 Fed. R. 604; *McKay v. Dibert*, 5 Fed. R. 587; *W. U. Tel. Co. v. Union Pacific R. R. Co.*, 3 Fed. R. 721; *Atlantic & Pacific Tel. Co. v. Union Pacific Ry. Co.*, 1 Fed. R. 745.

³ *W. U. Tel. Co. v. St. Jo. & W. Ry. Co.*, 3 Fed. R. 430; *W. U. Tel. Co. v. Burlington & S. W. Ry. Co.*, 11 Fed. R. 1; *American Union Tel. Co. v. Union Pacific Ry. Co.*, 1 McCrary, 188; *Atlantic & Pacific Tel. Co. v. Union Pacific Ry. Co.*, 1 McCrary, 541.

⁴ *Coffeen v. Brunton*, 5 McLean, 256; *Smith v. Cummings*, 1 Fisher Pat. Cas. 152; *French v. Brewer*, 3 Wall. Jr. 346; *Pentlarge v. Beeston*, 1 Fed. R. 862; *Kirby Bung Manuf. Co. v. White*, 1 Fed. R. 604; *Texas & Pac. Ry. Co. v. Interstate Trans. Co.*, 45 Fed. R. 5.

merce against unlawful monopolies, a preliminary injunction was refused when doubtful questions of law and fact were involved, partly upon the ground that as the United States tendered no bond, more injury would result to the defendant from the issue than to the plaintiff from the refusal of the writ.⁵ A preliminary injunction to restrain the infringement of a patent will nearly always be refused, if the defendant has ample pecuniary responsibility, or gives security against loss to the plaintiff, and is willing to keep an account of his manufacture, use, and sale of the article claimed to be patented, and the damages which the plaintiff will suffer can be readily reckoned in money.⁶ Danger of inconvenience to the public is a ground for refusing a preliminary injunction.⁷ A preliminary injunction may also be refused when the plaintiff has been guilty of laches in applying for it; even though his delay has not been such as to disentitle him to a perpetual injunction after the hearing.⁸ If an injunction has been obtained by an interlocutory order, and it is desired to continue it provisionally after a hearing, a direction to that effect should be inserted in the interlocutory decree then entered.⁹

§ 234. **The Writ of Injunction.** — Immediately upon the entry of an order for an injunction, the party who obtained it is entitled to have the writ issued from the clerk's office and served.¹ He should attend to this within a reasonable time. Where the writ was tested six weeks after the entry of the order granting it and was not served till nearly a year afterwards, the court refused to punish the defendant for disobedience, saying that, after the lapse of so much time, the plaintiff should have applied for leave to use the writ.² Like all other writs and processes issuing from the courts of the United States, writs of injunction must be under the seal of the court from which they issue, and signed by the

⁵ *United States v. Jellico M. C. & C. Co.*, 43 Fed. R. 898.

⁶ *Foster v. Moore*, 1 Curt. 279; *Morris v. Shelbourne*, 8 Blatchf. 266; *Gilbert & B. Manuf. Co. v. Bussing*, 12 Blatchf. 426; *Swift v. Jenks*, 19 Fed. R. 641; *Hoe v. Boston Daily Advertiser Co.*, 14 Fed. R. 914; *U. S. Annunciator Co. v. Sanderson*, 3 Blatchf. 184. But see *Gibson v. Van Dresar*, 1 Blatchf. 532; *Tracy v. Torrey*, 2 Blatchf. 275; *Parkhurst v. Kinsman*, 2 Blatchf. 78; *McWilliams Manuf. Co. v. Blundell*, 11 Fed. R. 419.

⁷ *Southwestern Brush El. L. & P. Co. v. Louisiana El. L. Co.*, 45 Fed. R. 893; *supra*, § 216.

⁸ *Gordon v. Cheltenham Ry. Co.*, 5 Beav. 229; *Mundy v. Kendall*, 23 Fed. R. 591; *Kerr on Injunctions*, 22, 23.

⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 1902. § 234. ¹ *Daniell's Ch. Pr.* (2d Am. ed.) 1816, 1817, 1964.

² *McCormick v. Jerome*, 3 Blatchf. 486.

clerk thereof. Those issuing from the Supreme Court or a Circuit Court must bear teste, from the date of such issue, of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a District Court must bear teste of the judge, or when that office is vacant, of the clerk thereof.³ "The orders pronounced by the Court in cases of special injunctions before answer, have varied at different periods. The form most frequently adopted enjoined the party '*till further order.*' In some cases the injunction has been till '*appearance and further order;*' in others till '*answer and further order.*' But the form at present used, and which is established by a rule laid down by Lord Eldon, is '*till answer or further order.*' This has been adopted as giving defendant the liberty to move, if necessary, to dissolve upon affidavit, before he has answered the bill."⁴ The writ should contain a concise description of the particular acts or things in respect to which the defendant is enjoined;⁵ and should conform to the directions of the order granting the injunction.⁶ If, however, the writ is broader than the order warrants, the defendant should apply to the court for an order setting it aside or modifying it.⁷ It seems that he is not justified in disobeying it and raising the objection when a motion is made for an attachment against him.⁸ It seems that a writ is insufficient which designates the acts sought to be enjoined by a reference to the bill without describing them.⁹ The English practice was to mention in the writ a money penalty to be incurred by the defendant if he disobeyed it; but that does not seem to be necessary here.¹⁰ The writ should be addressed to the persons whom it is desired to enjoin.¹¹ If the injunction is against waste, or forbids the continuance of a nuisance, or some other similarly inequitable act, it is usually addressed to the defendant, his servants, workmen, and agents;¹² if to restrain proceedings in another court, to the defendant, his attorneys, and agents,¹³ even though the bill prays for an injunc-

³ U. S. R. S. §§ 911, 912.

⁴ Daniell's Ch. Pr. (2d Am. ed.) 1895; 190.
Read v. Consequa, 4 Wash. 174.

⁵ Whipple v. Hutchinson, 4 Blatchf. 190.

⁶ Sickels v. Borden, 4 Blatchf. 14.

⁷ Sickels v. Borden, 4 Blatchf. 14.

⁸ Sickels v. Borden, 4 Blatchf. 14.

⁹ Whipple v. Hutchinson, 4 Blatchf.

¹⁰ Low v. Haul, 1 Wall. Jr. 345.

¹¹ Daniell's Ch. Pr. (2d Am. ed.) 1817.

¹² Kerr on Injunctions, 559; Daniell's Ch. Pr. (5th Am. ed.) 1673; Humphreys v. Roberts, Seton's Decrees (4th ed.), 173.

¹³ Daniell's Ch. Pr. (5th Am. ed.) 1673.

tion against the defendant alone. But the latter's tenants cannot be thus enjoined, unless they have become such after the commencement of the suit or have been made parties to it.¹⁴ The writ should be endorsed or subscribed with the name and office address of the plaintiff's solicitor, or with the name and residence of the plaintiff if he appears in person.¹⁵

§ 235. **Dissolution of Interlocutory Injunctions in General.** — The common injunction was dissolved as of course upon the defendant's putting in a sufficient answer to the bill. The practice in such a case was for him to obtain an order *nisi*, upon the return of which the injunction was always dissolved, unless the plaintiff could show that the answer was insufficient for the purpose either of defence or of discovery.¹ A special injunction can only be dissolved by a special motion, either in open court or at a special hearing appointed elsewhere for that purpose by a judge of the court.² The motion may be made at any time before decree,³ even, it seems, before the defendant has been served with process,⁴ and before he has appeared.⁵ When a special injunction has been granted against several defendants, any of them may move to dissolve it as against himself; but he should in that case serve the others as well as the plaintiff with a notice of his motion.⁶ In one case after answer, a notice left at the office of the solicitor for the plaintiff during his absence from the city three days before the motion was held sufficient.⁷ If the motion to dissolve is made before answer, it must be supported by affidavits or documentary proof contradicting the statements upon which the injunction was obtained,⁸ unless the defendant can show that it is plain upon the face of the plaintiff's bill and affidavits that he was not entitled to the injunction.⁹ When the injunction

¹⁴ *Hodson v. Coppard*, 29 Beav. 4; *Exchange v. Chicago Board of Trade*, 15 Kerr on Injunctions, 543.

¹⁵ Kerr on Injunctions, 559; *Daniell's Ch. Pr.* (5th Am. ed.) 1674.

§ 235. ¹ *Daniell's Ch. Pr.* (2d Am. ed.) 1820-1829; *Poor v. Carleton*, 3 Sumner, 70; *New York v. Connecticut*, 4 Dall. 1, 3, note 1, *per* Washington, J.

² Kerr on Injunctions, 561; *Daniell's Ch. Pr.* 1675; *Wilkins v. Jordan*, 3 Wash. C. C. 226; *Caldwell v. Walters*, 4 Cranch C. C. 577.

³ Kerr on Injunctions, 560; *Daniell's Ch. Pr.* (5th Am. ed.) 1675; *Met. G. & S.*

Exchange v. Chicago Board of Trade, 15 Fed. R. 847.

⁴ *Shields v. McClung*, 6 W. Va. 79.

⁵ *Menzies v. Rodrigues*, 1 Price, 92.

⁶ *Thompson v. Geary*, 5 Beav. 131; Kerr on Injunctions, 564. But see *Daniell's Ch. Pr.* (5th Am. ed.) 1676, note 1.

⁷ *Caldwell v. Walters*, 4 Cranch C. C. 577.

⁸ *Daniell's Ch. Pr.* (5th Am. ed.) 1676; *Young v. Grundy*, 6 Cranch, 51.

⁹ *Hudson v. Maddison*, 12 Simons, 416; *Kidwell v. Masterson*, 3 Cranch C. C. 52.

has been irregularly issued, the defendant should move to discharge the order granting it.¹⁰ If he should move to dissolve it, he might be held to have by so doing recognized its regularity.¹¹ It has been held that after a demurrer put in by him to the bill has been overruled a defendant can only move to dissolve by leave of the court; which was, in one case, only granted upon his affidavit that the demurrer was not interposed for delay, and his giving security to pay all damage to the plaintiff thereby caused.¹² Where the application for dissolution was made after answer, it was originally thought that the plaintiff could not show that any of the allegations therein contained were false;¹³ but that doctrine has been, in this country at least, exploded,¹⁴ and it is well settled that the plaintiff can not only dispute the truth of such allegations, whether they are positive or negative, but is at liberty to file counter affidavits in reply to new matter contained in the defendant's affidavits or answer.¹⁵ When a stay-order has been made, and simultaneous applications, by the defendant to discharge the stay-order, and by the plaintiff for an injunction, are heard together, the plaintiff has the right to open and close the argument.¹⁶ If upon the application to dissolve an injunction the court is not satisfied that the plaintiff is entitled to retain it, it will dissolve the injunction, and may then direct an issue, an action at law, or a reference before the hearing.¹⁷ If, however, it is satisfied that the plaintiff is entitled to the writ, the court will direct the injunction to be continued until the hearing.¹⁸ Where the court dissolves the injunction upon the ground that it appears upon the face of the bill that the plaintiff is not entitled thereto, and that is the only relief prayed for by him, it cannot at the same time dismiss the bill; for the plaintiff has still the right to bring the suit to a hearing.¹⁹ If the question

¹⁰ *Angier v. May*, 3 W. R. 330; *Daniell's Ch. Pr.* (5th Am. ed.) 1676; *Kerr on Injunctions*, 564.

¹¹ *Vipan v. Mortlock*, 2 Meriv. 476; *Kerr on Injunctions*, 564.

¹² *Woodworth v. Edwards*, 3 W. & M. 120.

¹³ *Daniell's Ch. Pr.* (5th Am. ed.) 1676, note 4.

¹⁴ *Poor v. Carleton*, 3 Sumner, 70; *United States v. Parrott*, 1 McAll. 271; *Orr v. Littlefield*, 1 W. & M. 13; *Orr v. Merrill*, 1 W. & M. 376; *Cum v. Brewer*, 2 Curt. 506.

¹⁵ *Day v. New England Car Spring Co.*, 3 Blatchf. 154; *Daniell's Ch. Pr.* (5th Am. ed.) 1676; *Shoemaker v. Nat. Mechanics' Bank*, 1 Hughes, 101.

¹⁶ *Fraser v. Whalley*, 2 Hem. & M. 10.

¹⁷ *Daniell's Ch. Pr.* (2d Am. ed.) 1897.

¹⁸ *Packington v. Packington*, 1 Dickens, 101; *Daniell's Ch. Pr.* (5th Am. ed.) 1678.

¹⁹ *Brooke v. Clarke*, 1 Swanst. 550; *Blow v. Taylor*, 4 Hen. & Munf. (Va.) 159.

is left in doubt upon the motion to dissolve, it seems that the motion will be denied.²⁰ The ambiguity of the order granting the injunction is sufficient ground for its dissolution or modification.²¹ The defendant's delay in moving to dissolve the injunction may deprive him of his right to have it dissolved.²² When a special injunction has been granted after a full hearing, it will not be dissolved except on new evidence.²³ It has been held that a preliminary injunction will not be dissolved after answer upon grounds shown by affidavits, which, from their not having been set up in the answer, cannot be used at the hearing of the whole case.²⁴ A judge will very rarely dissolve an injunction granted by one of his judicial brethren.²⁵ After an injunction has been dissolved, if evidence subsequently taken shows that it was properly issued, it may be issued anew.²⁶ The dissolution of an *ex parte* injunction on account of a suppression of material facts does not preclude the plaintiff from applying for another injunction on the merits.²⁷

§ 236. **Dissolution of Injunctions for Causes arising after their Issue.** — An injunction may also be dissolved if the plaintiff is guilty of gross and inexcusable delay in taking testimony or in bringing the cause to a hearing : ¹ and in general if from a change of circumstances its continuance would no longer serve any useful purpose.² The subsequent passage of an act of Congress legalizing a structure which has been enjoined as a nuisance is a reason for the dissolution of an injunction.³ It has been held that an injunction staying proceedings at law against a bankrupt is dissolved *ipso facto* by his discharge,⁴ but remains unaffected by his delay in applying for his discharge.⁵ The expiration of a

²⁰ *Cooper v. Mattheys*, 5 Penn. L. J. 38; s. c. Law Rep. 413; *Fisher v. Lord*, 6 West L. J. 137; *Woodworth v. Hall*, 1 W. & M. 389; *Woodworth v. Rogers*, 3 W. & M. 135; *Sparkman v. Higgins*, 1 Blatchf. 205.

²¹ *Dalglish v. Jarvie*, 2 Macn. & G. 231.

²² *Florence Sewing Machine Co. v. Grover & Baker Sewing Machine Co.*, 110 Mass. 1; *Kerr on Injunctions*, 565.

²³ *Woodworth v. Hall*, 1 W. & M. 389.

²⁴ *Union Paper Bag Machine Co. v. Newell*, 11 Blatchf. 549.

²⁵ *Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.*, 1 Saw. 685; *Preston v. Walsh*, 10 Fed. R. 315; *Reynolds*

v. Iron Silver Min. Co. 33 Fed. R. 354; *Klein v. Fleetford*, 35 Fed. R. 98.

²⁶ *Tucker v. Carpenter*, Hempst. 440.

²⁷ *Fitch v. Rochfort*, 18 L. J. Ch. 458; *Kerr on Injunctions*, 564.

§ 236. ¹ *Read v. Consequa*, 4 Wash. C. C. 174; *Bradley v. Reed*, 12 Pitts L. J. 65; *Shermerhorn v. L'Espenasse*, 2 Dall. 360; *In the Matter of Schwarz*, 14 Fed. R. 787.

² *In re Jackson*, 9 Fed. R. 493; *Id.* Pitts, 9 Fed. R. 542.

³ *Baird v. Shore Line Ry. Co.*, 6 Blatchf. 461.

⁴ *In re Thomas*, 3 N. B. R. 7.

⁵ *In re Schwarz*, 14 Fed. R. 787, 789.

patent does not without the order of the court dissolve an injunction against its infringement.⁶ It has been held that at the expiration of a patent the court will dissolve an injunction against its infringement, and leave the complainant no remedy except his claim for damages against the subsequent sale and use of articles manufactured while the patent was alive, in infringement of the patent.⁷ An injunction is not dissolved by an amendment of the bill⁸ unless the amendment substantially changes the cause of action.⁹ But it is customary to include in the order allowing an amendment a direction that it be "without prejudice to the injunction." The allowance of a demurrer to the whole bill puts an end to an injunction which had previously been obtained;¹⁰ but leave will usually be given to amend without prejudice to the injunction, when the demurrer is allowed on account of a defect in form,¹¹ such as multifariousness.¹² "The allowance of a plea does not dissolve an injunction. There may be some equity shown to continue it. An order for its dissolution must be obtained."¹³ An injunction is not dissolved by an abatement or by a defect in the suit, but the defendant must, if he wishes to be freed from the restraint thereby imposed, move that the plaintiff or his representatives be required to revive or take such other steps as may be necessary within a limited time, and that if he fail to do so the injunction may be dissolved.¹⁴

§ 237. **The Imposition of Terms upon the Issue, Denial, Dissolution, or Continuance of an Injunction.** — As the issue of a special injunction is in its discretion, the court may impose terms upon the plaintiff or defendant when granting or refusing the issue, dissolution, or continuance of the same.¹ The usual terms are

⁶ *American Diamond Rock Boring Co. v. Rutland Marble Co.*, 2 Fed. R. 356.

⁷ *Westinghouse v. Carpenter*, 43 Fed. R. 894, *Miller and Love. JJ.*; *American Cable Ry. Co. v. Chicago City Ry. Co.*, 41 Fed. R. 522. But see *American D. R. B. Co. v. Rutland Marble Co.*, 2 Fed. R. 356; *supra*, §§ 11, 216.

⁸ *Reed v. Consequa*, 4 Wash. C. C. 174; *Warburton v. London & Blackwall Ry. Co.*, 2 Beav. 253. But see *Sharp v. Ashton*, 3 V. & B. 144.

⁹ *Attorney-General v. Marsh*, 16 Simons, 572; *Kerr on Injunctions*, 566.

¹⁰ *Schneider v. Lizardi*, 9 Beav. 461, 468; *Kerr on Injunctions*, 565.

¹¹ *Rawlings v. Lambert*, 1 J. & H. 458; *Kerr on Injunctions*, 565, 566; *Lehigh Zinc & Iron Co. v. N. J. Zinc & Iron Co.*, 43 Fed. R. 545, 550.

¹² *Lehigh Zinc & Iron Co. v. N. J. Zinc & Iron Co.*, 43 Fed. R. 545, 550.

¹³ *Kerr on Injunctions*, 566; *Phillips v. Langhorn*, *Dickens*, 148; *Ferrand v. Hamer*, 4 M. & C. 143.

¹⁴ *Chowick v. Dimes*, 3 Beav. 290; *Lee v. Lee*, 1 Hare, 622; *Chester v. Life Association of America*, 4 Fed. R. 487.

§ 237. ¹ *Russell v. Farley*, 105 U. S. 433.

the giving of a bond or undertaking with good security to indemnify the other party against all loss that may result from the issue or withholding of the injunction.² It is not usual to require security from the United States when a preliminary injunction is granted at its request in a suit in which it is plaintiff.³ In some instances the court has withheld an injunction to restrain an infringement of a patent or copyright, upon the defendant's merely undertaking to keep an account of the sales made by him during the pendency of the suit.⁴ Sometimes the terms are that the defendant shall give an undertaking to abide by the farther order of the court.⁵ An injunction will never be issued to restrain the collection of State taxes, unless the plaintiff first pays "what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not."⁶ Whether or not, if the court upon the final hearing decides after a preliminary injunction has been denied that a perpetual one should issue, or dissolves an injunction previously granted, the finally successful party can have his damages assessed and the bond or undertaking given as security enforced by the court, or must bring an action at law, is under the authorities an open question. Mr. Justice Curtis held at circuit that he must sue at law;⁷ but a recent opinion of the Supreme Court, although expressly reserving the question, seems to intimate that a court of equity has the power to assess the damages and enforce payment of the bond.⁸ The latter view seems more in harmony with the general principles governing equity practice,⁹ and has been adopted by Judge Drummond in a recent case in a Circuit Court.¹⁰ Such a court has, at all events, the power to absolve from all liability the persons held by the bond, and it would take a very strong case to

² *Russell v. Farley*, 105 U. S. 433; *Kirby Bmg Manuf. Co. v. White*, 1 Fed. R. 604; *Northern Pacific R. R. Co. v. St. Paul, Minneapolis & Manitoba R. R. Co.*, 2 McCrary, 260; s. c. 4 Fed. R. 688.

³ *United States v. Jellico, M. C. & C. Co.*, 43 Fed. R. 898.

⁴ *Furbush v. Bradford*, 1 Fisher's Pat. Cas. 317; *McCrary v. Penn. Canal Co.*, 5 Fed. R. 367; *Kerr on Injunctions*, 29, 30.

⁵ *Attorney-General v. Manchester & Leeds Ry. Co.*, 1 [English] Railway Cases,

436; *Jones v. Great Western Ry. Co.*, 1 [English] Railway Cases, 684.

⁶ *State Railroad Tax Cases*, 92 U. S. 575, 617; *National Bank v. Kimball*, 103 U. S. 732; *Parmley v. Railroad Companies*, 3 Dill. 25; *Huntington v. Palmer*, 8 Fed. R. 449; *supra* § 84.

⁷ *Merryfield v. Jones*, 2 Curt. 306. See also *Bein v. Heath*, 13 How. 168.

⁸ *Russell v. Farley*, 105 U. S. 433.

⁹ See *Moore v. Moore*, 25 Beav. 8; *Suggden v. Hull*, 28 Beav. 263.

¹⁰ *Lea v. Deakin*, 13 Fed. R. 514.

induce an appellate court to interfere with such a decision by it.¹¹ In a recent case¹² the English Court of Chancery had occasion to discuss the nature and effect of an undertaking given on obtaining an injunction. Sir George Jessel, the Master of the Rolls, said that these undertakings were invented by Lord Justice Knight Bruce when Vice-Chancellor, and originally inserted only in *ex parte* injunctions. They were intended to protect the court as well as the suitor from improper *ex parte* applications. After a time this practice was extended to interlocutory injunctions granted upon notice to the defendant, first in special cases, then generally; and now it is always inserted as a matter of course. The reason for the thing is that on an interlocutory application there is only a short time to get up the case, and it is impossible for the court to obtain a complete knowledge of the facts. Further, these applications are heard upon affidavit evidence, so that it is impossible to say which side will ultimately turn out to be right. Therefore the court reserves power to indemnify the defendant in case it should have been induced, upon an incomplete hearing of the facts, to make a wrong order.¹² One point gave rise to a difference of opinion in the court; Jessel holding that the undertaking could not be enforced if the injunction was dissolved, on the ground that the court erred as to the law.¹² The other judges did not concur in this,¹³ and Lord Justice Cotton was equally clear the other way.¹³ The judges were also of opinion that the plaintiff could not recover for the loss of a contract into which he was prevented from entering by the injunction; since this, in the absence of fraud and malice, was too remote. The rule in *Hadley v. Baxendale*¹⁴ was applied, that only the proximate, ordinary or natural damages could be recovered, unless there was notice of a particular contract contemplated. The judges agreed that in this case the alleged contract was not made out; but held that if one had been proved, the prevention of carrying it into effect was not sufficient to sustain a claim to recover the damages for its loss by proceeding on the undertaking.¹⁵

¹¹ *Russell v. Farley*, 105 U. S. 453. See also *Deakin v. Stanton*, 3 Fed. R. 435; *Grandy v. Young*, 2 Cranch C. C. 114; *Bentley v. Joslin*, Hempst. 218.

¹² *Smith v. Day*, 21 Ch. D. 421, 424, 428, 429, 431.

¹³ Citing *Novello v. James*, 5 De G. M. & G., 876.

¹⁴ 9 Ex. 341.

¹⁵ *Smith v. Day*, 21 Ch. D. 421, 426, 428, 439. See *Lehman v. McQuown*, 31 Fed. R. 138; *infra* p. 391.

It has been held that when a bond has been given to secure an injunction against the interference with the possession of personal property, and the injunction has been subsequently dissolved, damages can be recovered under the bond for the damage caused the defendant by his delay in obtaining possession of the property and the proceeds thereof; that such damages include any loss caused by a fall in the market price of the property, provided it were property which had a market price and could have been sold at once on the market for a sum nearly equal to its value, but not if it were property which had no market price and could not have been sold immediately for a sum "anything like its value;" and that the profits which the defendant might have made by the use of the property in his business during the time that he was enjoined, are too remote and speculative to be recovered under the bond.¹⁶ It has been held that "an injunction bond in an action in the District Court of the United States for the District of Louisiana, conditioned that the obligors 'will well and truly pay the' obligee, 'defendant in said injunction, all such damages as he may recover against us, in case it should be decided that the said writ of injunction was wrongfully issued,' which bond was made under an order of the court 'that the injunction be maintained on the complaining creditors giving bond and security to save the parties harmless from the effects of said injunction,' is a sufficient compliance with the order of the court, and when construed with reference to the rule prevailing in the Federal courts (contrary to that prevailing in the State courts of Louisiana), that without a bond and in the absence of malice no damages can be recovered in such case, means that the obligors will pay such damages as the obligee may recover against them in a suit on the bond itself, whether incurred before or after the giving of the bond."¹⁷

§ 238. **Perpetual Injunctions.** — Perpetual injunctions can only be granted at the entry of a decree.¹ It is irregular to grant one upon affidavits.² In patent, trademark and copyright cases, however, they are often granted by an interlocutory decree which also directs a reference to a master for an accounting;³ but the court

¹⁶ *Lehman v. McQuown*, 31 Fed. R. 138; by Mr. Justice Brewer.

² *Adams v. Crittenden*, 17 Fed. R. 42.

³ *Rumford Chemical Works v. Hecker*,

¹⁷ *Meyers v. Block*, 120 U. S. 206.

11 Off. Gaz. 330; *Brown v. Deere*, 6 Fed.

§ 238. ¹ *Daniell's Ch. Pr.* (2d Am. ed.) R. 484; s. c. 2 *McCrary*, 425.

1903.

has the power to suspend the injunction until an appeal can be taken.⁴ A perpetual injunction is either originally granted, or continued. They may be granted originally in all cases in which temporary injunctions might have been granted, and also to restrain the setting up of outstanding terms when it would be inequitable to do so.⁵ In order to obtain a perpetual injunction, it is not necessary that a provisional injunction should have been asked for.⁶ For after the commencement of a suit seeking to prevent an act upon the defendant's part, he is said to proceed at his peril, and if the court finally decides in favor of the plaintiff it may order him to undo the result of his acts since he first had notice of the suit.⁷ A perpetual injunction may be obtained in a case where a preliminary injunction has been asked for and refused, or obtained and dissolved.⁸ If, however, the plaintiff has not previously obtained a preliminary injunction and, at the hearing fails to make out a clear title, he usually will not be allowed to use the facts proved by him, as evidence of a *prima facie* case, entitling him then to a temporary injunction till he can establish his case beyond a doubt;⁹ unless indeed, the injunction sought be one that is never granted before a hearing.¹⁰ The most common kinds of perpetual injunctions, however, are those which are made by continuing, or extending and making perpetual preliminary injunctions at the hearing. This can only be done by inserting a direction to that effect in the decree.¹¹ In order to support a decree for a perpetual injunction, it has been said that the court requires that there should be nothing like a doubt in the case.¹² The granting of such an injunction is in the discretion of the court, and, like a provisional injunc-

⁴ *Barnard v. Gibson*, 7 How. 650, 658; *Potter v. Mack*, 3 Fisher, 428; *Brown v. Deere*, 6 Fed. R. 487; *Munson v. The Mayor*, 19 Fed. R. 313.

⁵ *Askew v. Poulterers' Co.*, 2 Ves. Sen. 89; *Duke of Buckingham v. Duchess of Buckingham*, 2 Eq. Cases Abr. 527.

⁶ *Daniell's Ch. Pr.* (2d Am. ed.) 1900. See also *Baily v. Taylor*, 1 R. & M. 73.

⁷ *Charles River Bridge v. Warren Bridge*, 6 Pick. (Mass.) 376; *Wing v. Fairhaven*, 8 Cush. (Mass.) 363; *Winslow v. Nayson*, 113 Mass. 411; *Smith v. Day*, L. R. 13 Ch. D. 651.

⁸ *Daniell's Ch. Pr.* (2d Am. ed.) 1900; *Baily v. Taylor*, 1 R. & M. 73; *Bacon v.*

Spottiswoode, 1 Beav. 382; *Bacon v. Jones*, 4 M. & C. 433; *Tucker v. Carpenter*, Hempst. 410.

⁹ *Bacon v. Spottiswoode*, 1 Beav. 382; s. c. on appeal, *sub nom.* *Bacon v. Jones*, 4 M. & C. 433, 438; *Daniell's Ch. Pr.* (2d Am. ed.) 1901.

¹⁰ *Daniell's Ch. Pr.* (2d Am. ed.) 1901. See *supra*, § 226.

¹¹ *Daniell's Ch. Pr.* (2d Am. ed.) 1902; *Gardner v. Gardner*, 87 N. Y. 14.

¹² *Whittingham v. Wooler*, 2 Swanst. 428 n.; *Troy & B. R. R. Co. v. Boston, H. T. & W. Ry. Co.*, 86 N. Y. 107; *Daniell's Ch. Pr.* (2d Am. ed.) 1900.

tion, it may be allowed¹³ or refused¹⁴ upon terms. On account of the weight as a precedent given to a decree for a perpetual injunction in a patent case, the court may refuse to grant one when the case has been compromised and the defendant abandons it at the hearing.¹⁵

¹³ *Southern Express Co. v. St. Louis Iron Mt. & Southern Ry. Co.*, 10 Fed. R. 210; s. c. 10 Fed. R. 869.

R. 367; *Brown v. Deere, Mansur & Co.*, 6 Fed. R. 487.

¹⁵ *Hayes v. Leton*, 5 Fed. R. 521.

¹⁴ *McCrary v. Penn. Canal Co.*, 5 Fed.

CHAPTER XVII.

RECEIVERS.

§ 239. **Definition of Receiver.** — A receiver is an officer appointed by a court of equity to assume the custody of property pending litigation concerning the same. The utmost effect of the appointment of a receiver is to put the property from that time in his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title or even the right of possession to the property.¹ In England the term is usually applied only to those appointed to receive the rents and profits of land and to get in outstanding property; and one selected to carry on or superintend a trade or business is usually denominated “a manager,” or “a receiver and manager.”² But in the United States both classes of officers are called receivers. The Revised Statutes authorize the Comptroller of the Currency to appoint in certain cases a receiver of a national banking association, whose powers and duties are in many respects analogous to those of a receiver appointed by a court of equity.³ But, as the learning upon this subject does not concern the practice of courts of equity, it will not be considered here.

§ 240. **When Receivers will be Appointed.** — A receiver may be appointed to provide for the safety of property pending litigation to determine the title to the same; to preserve property in danger of being dissipated or destroyed by those having the legal title to its possession; to preserve the property of infants during their minority, when they have no guardian and their parents are dead or unfit to be trusted with it; to preserve the property of idiots and lunatics when it is impossible to obtain a proper person as committee; and when the appointment is authorized by statute.¹ A receiver may be appointed to provide for the safety of property

§ 239. ¹ *Union Bank of Chicago v. U. S. R. S. 216; 24 St. at L. ch. 28, p. 8; Kansas City Bank, 155 U. S. 223, 236. Price v. Abbott, 17 Fed. R. 506; supra,*

Deffell's Ch. Pr. (2d Am. ed.) 2006. § 15; and infra, §§ 240, 330.

See U. S. R. S. §§ 5234-5237; Laws of § 240. ¹ Kerr on Receivers (2d Am. 1876, ch. 156 (19 Stat. L. 63); 1st. Supp. ed.) 3.

pending litigation; to determine the title to the same, whether the litigation is in a court of equity,² of probate,³ of bankruptcy,⁴ in a foreign court,⁵ and sometimes, though very rarely, in a court of law.⁶ By far the most ordinary cases where a receiver is appointed are, however, suits in equity to obtain equitable assets, for the foreclosure of a mortgage, and for the dissolution or winding up of the affairs of a partnership. It was the English rule that a receiver could not be appointed at the suit of a first mortgagee, since he had it in his power to take possession himself.⁷ In this country, however, receivers are frequently appointed in such a case.⁸ As a general rule, a receiver of the effects of a partnership will not be appointed unless the bill prays a dissolution and shows a proper case for the same.⁹ But it has been said that "where suits have been instituted to compel partners to act according to the provisions of instruments into which they have entered; in such cases, the Court will take care that the decree shall not be defeated by anything to be done in the mean time, and will appoint a receiver to protect the property."¹⁰ Receivers may be appointed to preserve property in danger of being dissipated or destroyed by those having the legal title to its possession, at the suit of beneficiaries, legatees, next of kin, or creditors, when a trustee,¹¹ executor,¹² or administrator¹³ is in-

² *Davis v. The Duke of Marlborough*, 2 Swanst. 108; *Curling v. Marquis Townshend*, 19 Ves. 628.

³ *King v. King*, 6 Ves. 172; *Matter of Colvin*, 3 Md. Ch. Dec. 279; *Robinson v. Taylor*, 42 Fed. R. 803; *Kerr on Receivers* (2d Am. ed.), 28-37.

⁴ *Sedgwick v. Place*, 3 N. B. R. 35; *Alabama & Chattanooga R. R. Co. v. Jones*, 5 N. B. R. 97; *Keenan v. Shannon*, 9 N. B. R. 441; *Kerr on Receivers* (2d Am. ed.), 110-113.

⁵ *Transatlantic Co. v. Pietroni*, Johns. 604.

⁶ *Talbot v. Scott*, 4 K. & J. 96; *Fin- gal v. Blake*, 2 Molloy, 50; *Whitney v. Buckman*, 26 Cal. 447; *Horton v. White*, 84 N. C. 297; *Jefferys v. Smith*, 1 J. & W. 298; *Robinson v. Taylor*, 42 Fed. R. 803; *Kerr on Receivers* (2d Am. ed.), 114-129.

⁷ *Berney v. Sewell*, 1 J. & W. 647.

⁸ See, for example, *Stanton v. Alabama & Chattanooga R. R. Co.*, 2 Woods, 506; *Allen v. The Dallas & Wichita R. R. Co.*, 3 Woods, 316, 326.

⁹ *Goodman v. Whitecomb*, 1 J. & W. 589; *Oliver v. Hamilton*, 2 Anst. 453; *Daniell's Ch. Pr.* (2d Am. ed.) 1966, 1967; *Kerr on Receivers* (2d Am. ed.), 93.

¹⁰ *Daniell's Ch. Pr.* (2d Am. ed.) 1967; *Const v. Harris*, T. & R. 496.

¹¹ *McCosker v. Brady*, 1 Barb. Ch. (N. Y.) 329; *Brodie v. Barry*, 3 Meriv. 695; *Janeway v. Green*, 16 Abb. Pr. (N. Y.) 215, note. In *Benedict v. St. Joseph & W. R. Co.*, 19 Fed. R. 173, the fact that there was a dispute between the majority and a minority of the bondholders, the former being in possession, was held to make the appointment of a receiver necessary.

¹² *Utterson v. Mair*, 2 Ves. Jr. 95; *Scott v. Becher*, 4 Price, 346. But see *Gladson v. Stoneman*, 1 Madd. 143 n.; *Langley v. Hawk*, 5 Madd. 46; *Kerr on Receivers* (2d Am. ed.), 20.

¹³ *Hervey v. Fitzpatrick*, Kay, 421; *Ware v. Ware*, 42 Ga. 408.

solvent and has not given bonds, or is guilty of misconduct; or when two trustees or executors disagree so that it is impossible for them to act together;¹⁴ and at the suit of remainder-men, when the holder of the particular estate is guilty of voluntary or permissive waste,¹⁵ or improperly refuses to renew leaseholds.¹⁶ In the case of trustees, the court will thus interfere whether the trust is express or implied.¹⁷ A receiver may be appointed over the property of an infant,¹⁸ when the latter has no guardian, or his guardian is insolvent or has been guilty of misconduct¹⁹ and has no parents, or his parents are unfit to be entrusted with the care of his estate.²⁰ Receivers may be appointed over the property of idiots and lunatics, when no person can be found disposed to act as committee;²¹ or, it seems, when the committee is infirm, or the management of the estate is very onerous, or the committee lives far from the estate.²² The statutes of the several States authorize the appointment of a receiver in numerous cases, especially in providing for the dissolution of corporations. The statutes of the United States authorize the appointment of a receiver of a national bank by the Comptroller of the Currency in certain specified cases.²³ Until the Comptroller has acted, a court of the United States may appoint a receiver of the assets of such a corporation.²⁴ After the appointment by the Comptroller of such a receiver, it is doubtful whether a court of the United States would appoint another: and after the appointment of a receiver by a court of competent jurisdiction, it is doubtful whether the Comptroller of the Currency could thus interfere.²⁵ Independently of statutory authority a court of equity will ordi-

¹⁴ *Ball v. Tompkins*, 41 Fed. R. 486.

¹⁵ *Vose v. Reed*, 1 Woods, 647, 650.

¹⁶ *Bennett v. Colley*, 2 M. & K. 225; s. c. 5 Simons, 181, 192; *Lord Montford v. Lord Cadogan*, 17 Ves. 485.

¹⁷ *Pritchard v. Fleetwood*, 1 Meriv. 54; *Daniell's Ch. Pr.* (5th Am. ed.) 1724.

¹⁸ *Hicks v. Hicks*, 3 Atk. 277; *Union Trust Co. v. Illinois Midland Railway Co.*, 117 U. S. 434; *Sage v. Memphis & Little Rock R. R. Co.*, 125 U. S. 361; *Kerr on Receivers* (2d Am. ed.) 16-18.

¹⁹ *Pitcher v. Hellar*, Dickens, 580; *High on Receivers*, §§ 725-732.

²⁰ *Butler v. Freeman*, Amb. 301; *Kiffin v. Kiffin*, cited in 1 P. Wms. 705; *Kerr on Receivers* (2d Am. ed.) 16-18.

²¹ *Ex parte Warren*, 10 Ves. 622; *Anon.*, 1 Atk. 578; *Ex parte Radcliffe*, J. & W. 639; *Kerr on Receivers* (2d Am. ed.), 113, 114.

²² *Kerr on Receivers* (2d Am. ed.), 113, 114, citing *Re Birch*, Shelf. on Lun. 146; *Re Seaman*, Shelf. on Lun. 146.

²³ U. S. R. S. §§ 5141, 5191, 5195, 5201, 5205, 5234, 5235, 5236; *Laws of 1876*, ch. 156 (19 St. at L. p. 63); 1st Supp. U. S. R. S. p. 216.

²⁴ *Wright v. Merchants' Nat. Bank*, 1 Flippin, 568; *Irons v. Manufacturers' Nat. Bank*, 6 Biss. 301.

²⁵ *Harvey v. Lord*, 10 Fed. R. 236.

narily appoint a receiver of the property of a corporation in only seven cases :²⁵ firstly, at the suit of mortgagees or other holders of liens upon it ;²⁷ secondly, at the suit of judgment creditors seeking equitable assets after executions have been returned unsatisfied, and the return shows that there is no corporate property upon which a levy can be made ;²⁸ thirdly, at the suit of persons interested, whether as stockholders or creditors in the property, where there is a breach of duty by the directors, and an actual or threatened loss ;²⁹ fourthly, where a corporation has been dissolved and has no officer to attend to its affairs ;³⁰ fifthly, where for a long time the corporation has ceased to transact business and its officers have ceased to act ;³¹ sixthly, where the governing body is so divided and engaged in such mutual contentions that its members cannot act together ;³² and seventhly, in one case, a receiver was appointed at the application of the corporation itself, made before a default in the payment of interest upon bonds secured by mortgages, where it was for the interest of the public that the business carried on by the corporation — a railroad company — should be continued without interruption, and the corporation was hopelessly insolvent, and there was danger of an attempt by creditors to gain a preference by attachment or otherwise in such a manner as would have prevented the continuance of the corporate business.³³ A court of equity will often appoint a receiver of a

²⁵ See Kerr on Receivers (2d Am. ed.), 80-83; Bispham's note; *Howe v. Deuel*, 43 Barb. (N. Y.) 504, 507.

²⁷ *Milwaukie & Minn. R. R. Co. v. Soutter*, 2 Wall. 510; *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.*, 36 Fed. R. 221.

²⁸ *Covington Drawbridge Co. v. Shepherd*, 21 How. 112; *Shainwald v. Lewis*, 6 Fed. R. 166, 775; *Buckeye Engine Co. v. Donau Brewing Co.*, 47 Fed. R. 6. See *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 534; *Sage v. Memphis & L. R. Co.*, 125 U. S. 361.

²⁹ *Evans v. Coventry*, 5 De G. M. & G. 911; *Sage v. Memphis & Little Rock R.R. Co.*, 125 U. S. 361; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 43 Fed. R. 204. See, as to the right of bondholders thus to interfere, *Herrick v. Grand Trunk Ry. Co.*, 7 Upper Can. L.J. 240. But see also, concerning and apparently denying the right of unsecured

creditors, *Syers v. Brighton Brewery Co.*, 11 L. T. (N. S.) 550; *Mills v. Northern Ry. of Buenos Ayres Co.*, 23 L. T. (N. S.) 719.

³⁰ *The Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U. S. 1; *Lawrence v. The Greenwich Fire Ins. Co.*, 1 Paige (N. Y.), 587. See also *Hamilton v. Accessory Transit Co.*, 26 Barb. (N. Y.) 46; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140.

³¹ *Warren v. Fake*, 49 How. Pr. (N. Y.) 430, *per Westbrook*, J.

³² *Featherstone v. Cooke*, L. R. 16 Eq. 298; *Trade Auxiliary Co. v. Vickers*, L. R. 16 Eq. 303.

³³ *Wabash, St. L. & P. Ry. Co. v. Central Trust Co. of N. Y.*, 22 Fed. R. 138; s. c. 22 Fed. R. 272; s. c. 22 Fed. R. 513, 515. See also *Brassey v. New York & N. E. R. Co.*, 19 Fed. R. 663. *Contra*, *Hugh v. McRae, Chase*, 466.

railroad in a suit for the foreclosure of a mortgage containing a clause pledging its tolls and income, when it would not do so if no such clause were included in the mortgage.³⁴ In one case the court said: "The rights of holders of negotiable bonds issued by a railroad company and secured by a mortgage on its property, are not to be measured by the same rules as are applied to an ordinary mortgage on a farm or house and lot, to secure one or two notes held by one mortgagee."³⁵ Usually a receiver will not be appointed at the suit of subsequent lienors over property of which a mortgagee is in possession; but an injunction may be issued to prevent the mortgagor from applying the rents and profits to any other purpose than the satisfaction of the mortgage.³⁶ It has been held that an assignment made by a corporation for the benefit of creditors after the filing of a bill for the appointment of a receiver will not deprive the court of jurisdiction to appoint a receiver.³⁷ When a railroad is in the hands of receivers pending a foreclosure suit, the court may extend the receivership over a portion of the road for the benefit of an intervenor claiming a prior lien thereupon.³⁸ Upon an interlocutory application, in a suit to enjoin the infringement of a patent by an insolvent defendant, a Circuit Court appointed a receiver of the profits made by such infringement.³⁹

A receiver will not be appointed to assist a trust formed to maintain a monopoly, or otherwise to aid in the prosecution of an enterprise against public policy.⁴⁰

§ 241. **Rules regulating the Appointment of Receivers.**—It has been said, that in order to obtain the appointment of a receiver, the moving party must show, first, either that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim; and, secondly, that the possession of the property by the defendant was obtained by fraud; or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct, or

³⁴ *Allen v. The Dallas & Wichita R. R. Co.*, 3 Woods, 316; *Tysen v. Wabash R. Co.*, 8 Biss. 247.

³⁵ *Allen v. The Dallas & Wichita R. R. Co.*, 3 Woods, 316, 323, *per* Woods, J.

³⁶ *United States v. Marich*, 44 Fed. R. 19.

³⁷ *Belmont Nail Co. v. Columbia Iron & Steel Co.*, 46 Fed. R. 8.

³⁸ *Mercantile Trust Co. v. Missouri K. & T. Ry. Co.*, 41 Fed. R. 8, 9.

³⁹ *Parkhurst v. Kinsman*, 2 Blatchf. 78.

⁴⁰ *American Biscuit & Manuf. Co. v. Klotz*, 44 Fed. R. 721.

insolvency of the defendant.¹ The appointment of a receiver is always in the discretion² of the court, which, however, must be exercised with great circumspection,³ and is subject to review by an appellate court.⁴ It has been said, that the appointment can be made only in accordance with the following rules: "1st. That the power of appointment is a delicate one, and to be exercised with great circumspection. 2d. That it must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property. 3d. That there is no case in which the court appoints a receiver merely because the measure can do no harm. 4th. That 'fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved;' and 5th. That unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application."⁵

§ 242. **Ancillary Receivers.**—An ancillary receiver is a receiver appointed in aid of a receiver appointed by another court.¹ When a receiver has been appointed by one Federal Circuit Court, the others through judicial comity will usually appoint the same person an ancillary receiver of so much of the same estate as is within their jurisdiction.² In such a case the accounting of the receivers, and nearly all proceedings affecting the estate, are usually first instituted in the court that first made the appointment.³ This subject, however, rests in the discretion of the court that has made the ancillary appointment, which has full control over the receiver whom it appointed.⁴ In a case where the judges sitting in the

§ 241. ¹ Chancellor Buckner in *Mays v. Rose*, Freeman's Ch. (Miss.) R. 703, 718. See also *Beecher v. Bininger*, 7 Blatchf. 170; *Tysen v. The Wabash R. R. Co.*, 8 Biss. 247.

² *Owen v. Homan*, 4 H.L.C. 997, 1032.

³ *Milwaukie & Minn. R. R. Co. v. Soutter*, 2 Wall. 521.

⁴ *Tysen v. The Wabash R. R. Co.*, 8 Biss. 247.

⁵ *Le Grand, C. J.*, in *Blondheim v. Moore*, 11 Md. 365, 374.

§ 242. ¹ *Jennings v. Phila. & Reading R. R. Co.*, 23 Fed. R. 569; *Williams v. Hintermeister*, 26 Fed. R. 889. But see *Mercantile Trust Co. v. Kanawha & O. Ry. Co.*, 39 Fed. R. 337; *supra*, § 10.

² *Jennings v. Ph. & Reading R. R. Co.*, 23 Fed. R. 569; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. R. 618, *supra*, § 10. See also *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed. R. 305. But see *Atkins v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. R. 161; *Central Trust Co. v. Texas & St. L. Ry. Co.*, 22 Fed. R. 135.

³ *Jennings v. Phila. & Reading R. R. Co.*, 23 Fed. R. 569.

⁴ *Atkins v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. R. 161; *Central Trust Co. v. Texas & St. L. Ry. Co.*, 22 Fed. R. 135. But see *Parsons v. Charter Oak Life Ins. Co.*, 31 Fed. R. 305.

Circuit Courts of different districts in the same circuit differed in the instructions given by them to the same person, who had been appointed receiver of the same railroad in each district, the circuit judge refused to interfere.⁵ A judgment against an ancillary receiver does not affect the assets in the jurisdiction where a receiver was first appointed.⁶ “Where a receiver or administrator or other custodian of an estate is appointed by the courts of one State, the courts of that State reserve to themselves full and exclusive jurisdiction over the assets of the estate within the limits of the State. Whatever orders, judgments, or decrees may be rendered by the courts of another State, in respect to so much of the estate as is within its limits, must be accepted as conclusive in the courts of primary administration; and whatever matters are by the courts of primary administration permitted to be litigated in the courts of another State, come within the same rule of conclusiveness. Beyond this, the proceedings of the courts of a State in which ancillary administration is held are not conclusive upon the administration in the courts of the State in which primary administration is had. And this rule is not changed, although a party whose estate is being administered by the courts of one State permits himself or itself to be made a party to the litigation in the other. Whatever may be the rule, if jurisdiction is acquired by a court before administration proceedings are commenced, the moment they are commenced, and the estate is taken possession of by a tribunal of a State, the moment the party whose estate is thus taken possession of ceases to have power to bind the estate in a court of another State, either voluntarily or by submitting himself to the jurisdiction of the latter court.”⁷

§ 243. **Terms upon the Appointment of Receivers, and Preferences in Foreclosure Suits.**—As the appointment of a receiver is in its discretion, the court may impose terms upon the party applying for it. Thus, it may insist as a condition precedent to appointing a receiver to manage a colliery that the moving party advance the funds necessary to continue the business.¹ So, a party or person interested in a suit was in England rarely appointed

⁵ *Central Trust Co. v. Texas & St. L. Ry.*, 22 Fed. R. 135.

⁶ *Reynolds v. Stockton*, 140 U. S. 254, 272.

⁷ *Reynolds v. Stockton*, 140 U. S. 254, 272, *per* Mr. Justice Brewer.

§ 243. ¹ *Gibbs v. David*, L. R. 20 Eq. 373.

receiver unless he agreed to act without compensation.² In a leading case, the Supreme Court laid down the rule as regards the appointment of receivers in suits for the foreclosure of railroad mortgages, as follows: "We have no doubt that when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property as may, under the circumstances of the particular case, appear to be reasonable."³ This is said elsewhere in the case to depend upon the application of the maxim that he who seeks equity must do equity.⁴ It is the better practice for the court to provide for preferences as a condition upon the appointment of the receiver.⁵ "If no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made out of earnings which ought in equity to have been employed to keep down debts for labor, supplies, and the like, it is within the power of the court to use the income of the receivership to discharge obligations which, but for the diversion of funds, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own hands as, if practicable, to restore the parties to their original equitable rights. While, ordinarily, this power is confined to the appropriation of the income of the receivership and the proceeds of moneyed assets that have been taken from

² *Wilson v. Greenwood*, 1 Swanston, 471.

³ Chief Justice Waite in *Fosdick v. Soholl*, 99 U. S. 235, 251, 252. See also *Turner v. Indianapolis, B. & W. Ry. Co.*,

8 Biss. 315. *Contra*, *Coe v. N. J. Midland Ry. Co.*, 27 N. J. Eq. 37.

⁴ *Fosdick v. Soholl*, 99 U. S. 235, 253.

⁵ *Central Trust Co. v. St. Louis A. & T. Ry. Co.*, 41 Fed. R. 551.

the company, cases may arise where equity will require the use of the proceeds of the sale of the mortgaged property in the same way. Thus it often happens that, in the course of the administration of the cause, the court is called upon to take income which would otherwise be applied to the payment of old debts for current expenses, and use it to make permanent improvements on the fixed property, or to buy additional equipment. In this way the value of the mortgaged property is not infrequently materially increased. It is not to be supposed that any such use of the income will be directed by the court, without giving the parties in interest an opportunity to be heard against it. Generally, as we know both from observation and experience, all such orders are made at the request of the parties or with their consent. Under such circumstances, it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what is thus again diverted from the current debt fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the chancellor when he comes to act. The power rests upon the fact, that in the administration of the affairs of the company the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion. If, in the exercise of this power, errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well-settled rules of equity jurisprudence to the facts of the case, as established by the evidence."⁶ Ordinarily, claims of this nature are paid out of the

⁶ Chief Justice Waite in *Fosdick v. Union Trust Co. v. Souther*, 107 U.S. 591; *Schall*, 99 U. S. 235, 253, 254. See also *Union Trust Co. v. Walker*, 107 U.S. 596; *Fosdick v. Car Co.*, 99 U. S. 256; *Hale v. Burnham v. Bowen*, 111 U.S. 776; *Blair v. St. Louis, H. & K. Ry. Co.*, 22 Fed. R. Frost, 99 U. S. 389; *Miltenerberger v. Loganport Ry. Co.*, 106 U. S. 286, 308; 471, 474, with a valuable note by Benj. F.

earnings of the road, but they are sometimes paid from the proceeds of its sale.⁷ This doctrine was extended in a subsequent case where, instead of a sale, the mortgagees sought a decree of strict foreclosure; which was granted saving the rights of intervenors.⁸ The Supreme Court then said again: "As the diversion of the fund created in equity a charge on the property as security for its restoration, it is clear that if the mortgagees prefer to take the property under a decree of strict foreclosure, they take it subject to the charge in favor of the current debt creditor whose money they have got, and that he can insist on a sale of the property for his benefit if they fail to make the payment without."⁹ "We do not now hold, any more than we did in *Fosdick v. Schall* [99 U. S. 235] or *Huidekoper v. Locomotive Works*, 99 U. S. 258, 260, that the income of a railroad in the hands of a receiver, for the benefit of mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. All we then decided, and all we now decide, is, that if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."¹⁰ In a proper case the disbursements of a prior receiver appointed at the suit of a junior incumbrancer may be thus given a preference when they were essential for the maintenance of the mortgaged property.¹¹

In a recent case the Supreme Court said: "The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general

Rex, Esq., of the St. Louis bar; *Porter v. Pittsburgh Bessemer Steel Co.*, 120 U. S. 649; *Douglas v. Cline*, 12 Bush (Ky.), 608. But see *Penn. v. Calhoun*, 121 U. S. 251; *St. Louis, A. & T. H. R. R. Co. v. Cleveland, C. C. & I. Ry. Co.*, 125 U. S. 658; *Wood v. Guarantee Trust & Safe Deposit Co.*, 128 U. S. 416; *U. S. Trust Co. v. N. Y. W. S. & B. R. Co.*, 25 Fed. R. 800.

⁷ *Brewer, J.*, in *Blair v. St. Louis, H. & K. Ry. Co.*, 22 Fed. R. 471, 474.

⁸ *Burnham v. Bowen*, 111 U. S. 776.

⁹ Chief Justice Waite in *Burnham v. Bowen*, 111 U. S. 776, 782, 783.

¹⁰ Chief Justice Waite in *Burnham v. Bowen*, 111 U. S. 776, 783.

¹¹ *Kneeland v. Bass Foundry & Machine Works*, 140 U. S. 592; *Miltnerberger v. Logansport Ry. Co.*, 106 U. S. 286.

and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and who ever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea, that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens. *Railroad Co. v. Railway Co.*, 125 U. S. 658, 673. So that these intervenors acquired no right of priority by virtue of their antecedent contracts of sale. But it is urged, and with force, that the court did not allow contract price, but only rental, and the question is asked, may a court, through its receiver, take possession of property and pay no rental for it? If it may legitimately compel the operation of the railroad in the hands of its receiver, in order to discharge the obligations of the company to the public, may it not also, and must it not also burden that receivership, and the property in charge of the receiver, with all the expenses connected with the operation of the road, together with reasonable rentals for the property used and necessary for the operation of the road? As to the general answer to these inquiries, we have no doubt. A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and the expenses which the court cre-

ates in discharge of those obligations are burdens necessarily on the property taken possession of, and this irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership. So if, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies, or rentals, and make such expenses a prior lien on the property itself.”¹²

The mere fact that money loaned to the mortgagor was expended in paying interest upon the mortgage bonds and operating expenses so as to enable the railway company to maintain itself as a going concern, is insufficient to entitle the lender to a preference.¹³

In accordance with these principles, it has become the practice in the seventh circuit to impose as a condition upon the appointment of a receiver in a suit for the foreclosure of a railroad mortgage, that debts for materials and supplies and labor furnished to the mortgagor within the six previous months be paid out of the net income or the proceeds of the sale of the road, before the debt secured by the mortgage.¹⁴ This is called “the six months rule.”¹⁵ Other circuits adopt a similar practice.¹⁶ Three months is a not uncommon limitation of time.¹⁷ Claims due eight¹⁸ and eleven¹⁹ months before the receivership have been given a preference. And in one case those who advanced money, after a default in interest but two years before the receivership, to pay the arrears of wages due striking laborers, under a promise from the presi-

¹² *Kneeland v. American Loan & Trust Co.*, 136 U. S. 97, 98, *per Mr. Justice Brewer*.

¹³ *Morgan's La. & T. R. R. & S. S. Co. v. Texas Central Ry. Co.*, 137 U. S. 171. See *George v. St. Louis Cable & W. Ry. Co.*, 44 Fed. R. 117.

¹⁴ *In re Kelly v. Receiver of Green Bay & Minn. R. R. Co.*, 5 Fed. R. 846. See *Union Trust Co. v. Souther*, 107 U. S. 591, 593; *Union Trust Co. v. Ill. Midland Ry. Co.*, 117 U. S. 434; *Blair v. St. Louis, H. & K. Ry. Co.*, 22 Fed. R. 471, 474.

¹⁵ *In re Kelly v. Receiver of Green*

Bay & Minn. R. R. Co., 5 Fed. R. 846, 851, *note*.

¹⁶ *Atkins v. Petersburg R. R. Co.*, 3 Hughes, 307; *Blair v. St. Louis, H. & K. Ry. Co.*, 22 Fed. R. 471, 474; *Olyphant v. St. Louis Ore & Steel Co.*, 22 Fed. R. 179; *Taylor v. Phila. & Reading R. R. Co.*, 7 Fed. R. 377.

¹⁷ *Fosdick v. Schall*, 99 U. S. 235, 238; *Hale v. Frost*, 99 U. S. 389; *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286, 308.

¹⁸ *Skiddy v. Atlantic, Miss. & Ohio R. R. Co.*, 3 Hughes, 320.

¹⁹ *Burnham v. Bowen*, 111 U. S. 776.

dent of the mortgagor that they would be repaid out of the current earnings of the road, were given a preference.²⁰ Had security been taken and no such promise been made, no such preference would probably have been given them.²¹ A claim for the price of rails furnished a year before the receivership was denied a preference.²² So was a claim by a contractor for the construction of a part of the road due three years before the appointment of the receiver.²³ The price of gas meters was held not to be a part of the "operating expenses" of a gas company.²⁴ The claim of a secretary for a balance of salary due him within the prescribed time has been thus preferred.²⁵ A president forfeits any right he may possess to such a preference by publishing in the annual report a statement that his salary has been paid.²⁶ A debt due an attorney for services performed immediately before the appointment of the receiver has been preferred under this rule;²⁷ but not, in the absence of special circumstances, a debt due for such services, rendered more than a year before the appointment;²⁸ nor for his payment, at the request of the president of the company, a few weeks before its default, under a promise of reimbursement within a few months, of judgments and other claims against it for wages and injuries to cattle;²⁹ nor for his payment as surety upon appeal bonds of judgments against the railroad upon claims two or three years old, although the appeals were taken a few months before the appointment of the receiver, and the payment made after that appointment.³⁰ When the order of appointment gives a preference to "wages of employees," counsel fees due an attorney who was not employed as general counsel are not included; but if such

²⁰ *Atkins v. The Petersburg R. R. Co.*, 3 Hughes, 307.

²¹ *Duncan v. Mobile & Ohio R. R. Co.*, 2 Woods, 542; *Addison v. Lewis*, 75 Va. 701, 713, 714.

²² *Skiddy v. Atlantic, Miss. & Ohio R. R. Co.*, 3 Hughes, 320.

²³ *Addison v. Lewis*, 75 Va. 701, 714, 715.

²⁴ *Reyburn v. Consumers' Gas, Fuel & Light Co.*, 29 Fed. R. 561.

²⁵ *Olyphant v. St. Louis Ore & Steel Co.*, 22 Fed. R. 179. But see *Wells v. Southern Minn. Ry. Co.*, 1 Fed. R. 270; *Addison v. Lewis*, 75 Va. 701, 712, 713.

²⁶ *Addison v. Lewis*, 75 Va. 701, 713.

²⁷ *Blair v. St. Louis, H. & K. Ry. Co.* (Norton, Intervenor), 23 Fed. R. 521. But see *Louisville, E. & St. L. R. R. Co. v. Wilson*, 138 U. S. 501.

²⁸ *Blair v. St. Louis, H. & K. Ry. Co.* (Norton, Intervenor), 23 Fed. R. 521. But see *Louisville, E. & St. L. R. R. Co. v. Wilson*, 138 U. S. 501.

²⁹ *Blair v. St. Louis, H. & K. Ry. Co.* (Norton, Intervenor), 23 Fed. R. 521.

³⁰ *Blair v. St. Louis, H. & K. Ry. Co.* (Norton, Intervenor), 23 Fed. R. 523. But see *Union Trust Co. v. Morrison*, 125 U. S. 591.

services resulted in a benefit to the mortgaged property, their reasonable value may be paid the attorney before payment is made upon the bonds, but not otherwise.³¹ The counsel fees of the attorney for the mortgagor cannot be awarded a preference, unless the mortgage so provides.³² In a bondholder's foreclosure suit, the fees of a counsel in a foreclosure suit previously instituted by him at the request of the trustees, and suspended under their instructions without any default on his part, may be allowed a preference.³³ Preferences have thus been given to claims for fuel,³⁴ locomotives,³⁵ cars,³⁶ reasonable car-rent,³⁷ car-springs and spirals,³⁸ repairs,³⁹ and "limited amounts due other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result,

³¹ *Louisville, E. & St. L. R. R. Co. v. Wilson*, 138 U. S. 501. But see *Gurney v. Atlantic & G. W. Ry. Co.*, 58 N. Y. 358.

³² *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.*, 41 Fed. R. 8, 10. *Contra*, *Bound v. South Carolina R. Co.*, 43 Fed. R. 404.

³³ *Cowdrey v. Galveston, H. & H. R. R. Co.*, 93 U. S. 352.

³⁴ *Burnham v. Bowen*, 111 U. S. 776.

³⁵ *Fosdick v. Schall*, 99 U. S. 235, 238.

³⁶ *Fosdick v. Schall*, 99 U. S. 235, 238; *Fosdick v. Car Co.*, 99 U. S. 256; *Frank v. Denver & R. G. Ry. Co.*, 23 Fed. R. 123.

³⁷ *Thomas v. Peoria & R. I. Ry. Co.*, 36 Fed. R. 808; *Kneeland v. American Loan Co.*, 136 U. S. 89-100, 101-103; *per Mr. Justice Brewer*:—

"Now, when the holder of a first lien upon the realty alone asks the court of chancery to take possession, not only of the real but also of personal property, used for the benefit of the real, that application is a consent on its part that the rental value of the personalty thus taken possession of and operated for the benefit of the realty shall be paid in preference to its own claim. The proposition is a simple one. The application may not be a consent that the contract price of the personalty shall be paid in preference to his lien; but it certainly is a con-

sent that the rental value of that personalty, during the time of the possession by the receiver appointed at his instance, may have priority to his claim."

"But one answer can be made to this inquiry, and that is that its application is a consent to the payment of reasonable rental during the possession of the receiver,—a rental not based upon the use actually made by the receiver, but on the ordinary value of the rental of such property. So, although it may be true, as claimed by counsel, that more was taken possession of than was needed, and that there was only a limited use of each car and engine, yet the case is to be taken as though all were needed and full use made of all; and that sum which would be reasonable rental value for such use should be paid. Such value is not to be determined by the amount of actual use, but by what, in the first instance and before the use had been had, would be adjudged a reasonable rental value. Upon such basis no complaint can be made of the amount fixed by the court, reducing as it did the amount reported by the master." See also *Farmers' Loan & Trust Co. v. Chicago & A. Ry. Co.*, 42 Fed. R. 26.

³⁸ *Hale v. Frost*, 99 U. S. 389.

³⁹ *Fosdick v. Schall*, 99 U. S. 235, 238; *Milttenberger v. Logansport Ry. Co.*, 106 U. S. 286, 311.

in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic."⁴⁰ Where a balance is due upon the purchase price of cars or locomotives delivered to the railroad company under a contract of conditional sale, and the seller reclaims them or the receiver rejects them, a claim for the value of their use or for the injury done to them while in the possession of the railroad is not entitled to a preference.⁴¹ If, however, the receiver retains them with the assent of the seller, the balance of the purchase money, or at least the reasonable value of their use by the receiver,⁴² may be a preferred claim to that of a prior mortgagee,⁴³ at whose suit the receiver was appointed, but not the value of their use by a former receiver appointed at the suit of a judgment creditor to which the mortgagee was a party;⁴⁴ and where the value of the purchase price is allowed a preference, it is inferior to the claims of laborers for service rendered immediately before the appointment of the receiver and subsequently to the delivery of the rolling stock to the company.⁴⁵ In one case it was held, that a claim for oil necessary for use in operating a railroad, which was furnished before a default in interest, was inferior to that of the mortgagees; but that a claimant for such oil furnished since a default in the payment of interest had an equitable lien superior to the mortgagees, when the claimant had accepted a promissory note of the railroad company on account of part of both classes of indebtedness; which note he surrendered to the receiver upon petitioning for the payment of his claim.⁴⁵ Where, before the appointment of a receiver, a bondholder accepted a compromise which scaled down the indebtedness; in pursuance thereof surrendered his bonds and coupons, under an agreement to receive in exchange new bonds secured by a subsequent mortgage; and did receive new bonds

⁴⁰ *Miltenerberger v. Logansport Ry. Co.*, 106 U. S. 286, 311, *per* Blatchford, J.

⁴¹ *Fosdick v. Schall*, 99 U. S. 235, 255; *Huidekoper v. Locomotive Works*, 99 U. S. 258; *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 97.

⁴² *Fosdick v. Car Co.*, 99 U. S. 256; *Frank v. Denver & R. G. Ry. Co.*, 23 Fed. R. 123.

⁴³ *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 103.

⁴⁴ *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89, 97. But see *Kneeland v. Bass Foundry & Machine Works*, 140 U. S. 592; *Miltenerberger v. Logansport Ry. Co.*, 106 U. S. 286.

⁴⁵ *Frank v. Denver & R. G. Ry. Co.*, 23 Fed. R. 123.

⁴⁶ *Central Trust Co. v. Texas & St. L. Ry. Co.*, *In re* *Waters Pierce Oil Co.*, *Intervenor*, 23 Fed. R. 703.

sufficient to replace the greater part of those which he surrendered; but there were a few for which no new bonds were issued, apparently because no new bonds were issued for so small an amount,—it was held that his unadjusted claim for this balance remained secured by the old mortgage, and was superior to those under the subsequent mortgage given to secure the new bonds.⁴⁷ In two cases, decided by the same judge, a preference was given to claims for personal injuries through negligence within the prescribed time.⁴⁸ Claims for damages by fire to

⁴⁷ *Blair v. St. Louis, H. & K. Ry. Co.* (Greene, Intervenor), 23 Fed. R. 524.

⁴⁸ *Central Trust Co. of N. Y. v. Texas & St. L. Ry. Co.*, 22 Fed. R. 135; *Dow v. Memphis & L. R. R. Co.*, 20 Fed. R. 260, 266, 267, Caldwell, J. But see *Central Trust Co. v. East Tenn., V. & G. R. Co.*, 30 Fed. R. 895; *Farmers' Loan & Trust Co. v. Green Bay, W. & St. P. Ry. Co.*, 45 Fed. R. 664, 666, 667, *per Jenkins, J.*

"The principle is here sought to be extended to embrace a claim for a death occurring in the operation of the road within the limited period. In an able and ingenious argument the counsel for the petitioner insists that, although the liability for the death here rests upon statute law, and is to a stranger to the contract of hiring, and arises from failure of duty enjoined by the law of master and servant, yet that the liability is imposed by the law upon, and constitutes a term of, the contract of hiring, and so must be regarded as a liability incurred in the operation of the road, having priority of payment over a precedent mortgage. This proposition finds support in the case of *Dow v. Railroad Co.*, 20 Fed. Rep. 260. There Judge Caldwell, in appointing a receiver of the railway, provided by his order for the payment of all obligations incurred for injuries to persons within the six preceding months. He states that failure by the trustee to take possession works an implied assent that the earnings of the road should be applied to compensate those damaged in its operation, and asserts that the rulings of the supreme court furnish ample authority for such order. A careful reading of all decisions of the supreme tribunal upon that subject convinces me that

Judge Caldwell has either misconceived the underlying principle of these decisions, or seeks to extend it unduly.

"The Supreme Court, as I read the opinions, has been most careful to limit the doctrine to claims representing that which has inured to the benefit of the mortgaged property, such as labor and supply claims, amounts due to connecting roads for material, repairs, ticket and freight balances, and the like, allowing priority to such claims, because their non-payment would cause cessation of work, supplies, and running arrangements, and result in stoppage in the operation of the road, which, in the interest, as well of the bondholder as of the public, is not to be tolerated. The doctrine is analogous to that of the admiralty allowing certain supplies to a vessel precedence over a mortgage upon the vessel, and rests upon the same principle. The vessel must not be allowed to rot at the wharf. The railway must not be permitted to rust, and its franchise to be forfeited, through failure to operate. Such things, therefore, that are done to avoid such result, working destruction to the mortgage, should be compensated in priority to the mortgage. The protection accorded is for that done for the benefit of the *res*, not that suffered in the doing, not to the individual right under the contract; for that done in performance of the contract, not that suffered by breach of contract; for labor and supplies furnished, not wrong sustained. A death claim does not come within the principle. The loss of life occurred in the operation of the road, but arose from failure of duty. It happened in the performance of the contract, but not because of performance.

adjoining property caused before the appointment of the receiver, have been denied a preference.⁴⁹ Where the parties to a foreclosure suit waived a sale, and entered an order by consent leasing the property to another railroad and appointing a receiver of the rent, the court directed that all floating unsecured creditors should be paid out of the rent before its application in discharge of the claims of the bondholders.⁵⁰ That a creditor for supplies has taken notes of the railroad company extending its time of payment for one month will not prejudice his claim

Its promoting cause was the default of the company, not the labor performed. The resulting death was a detriment, not an aid, to the road. It was in no possible sense of advantage to the mortgage interest. The *res* was not benefited, and that I take it, is the test. If failure to take possession works an implied assent that the earnings should be applied in compensation of casualties in priority to the mortgage, why not as to all floating indebtedness, to all improvements upon the road, and irrespective of time? Why not say that, through failure to take possession, the bondholders assent that earnings should be devoted to the payment of all debts incurred after default in the payment of interest, and in priority thereto? Why limit such priority to the period of six months prior to the receivership? If priority is to be predicated upon implied assent, instead of upon benefit to the *res*, it should be allowed to all claims arising during failure to take possession from which assent is implied. The priority should be co-extensive in point of time with the implied assent. That logically results from the principle bottomed upon implied assent. Such doctrine is, to my thinking, a broad departure from the equitable doctrine declared by the Supreme Court, and would be ruinous in its consequences. If conceded, the entire floating debt of a railway company, occurring after default in payment of interest, and during failure to take possession, would necessarily and logically be given priority. Vested rights of property would be subjected to great detriment under such holding. The bonds of American railways are scattered throughout Europe, and are held in many hands. It requires much time to institute concerted action

by the holders after default in payment of interest. Meantime, unprincipled directors, anxious to retain possession of the road, could contract indebtedness — given priority by such ruling — working ruin to the mortgage interest. The bondholder would be 'improved out of his estate,' and his vested rights placed at the mercy of hostile directors. I am unwilling to assent to such doctrine. I do not understand it to be law. The rule is that current income should be first devoted to the current expenses of operation. Liability for death is not an expense of operation in any just sense of the term. It is an unsecured debt, and, as such, cannot take precedence in payment over prior and express liens. *St. Louis, &c. R. Co. v. Cleveland, &c. Ry. Co.*, 125 U. S. 658, 673, 8 Sup. Ct. Rep. 1011.

"The application was presented only upon the theory of priority. The record presents no disclosure touching income. There is no suggestion of its diversion. There has been no sale of the road. It may happen that the income will more than suffice to discharge the operating expenses and the unpaid and accruing interest. There may arise equities sanctioning payment of the claim not possible now to forecast. The petitioner may therefore take order for an issue to determine the question of liability of the company and its amount, subject, with respect to payment, to the ruling herein declared."

⁴⁹ *In re Dexterville Manuf. & Boom Co. v. Case*, 4 Fed. R. 873; *Hiles v. Case*, 4 Fed. R. 141; s. c. 9 Biss. 549. *Contra*, *Dow v. Memphis & L. R. R. Co.*, 20 Fed. R. 260, 266, 267.

⁵⁰ *Farmers' L. & Tr. Co. v. Mo. I. & N. Ry. Co.*, 21 Fed. R. 264.

to a preference.⁵¹ Neither will his acceptance of a renewal of these notes after the receiver's appointment.⁵² An assignee of a preferred claim has all the rights of his assignor.⁵³ Where a claim to a preference is made because money was loaned the mortgagor at the request of the bondholders, a request made by all the bondholders must be shown or the preference will be denied.⁵⁴ In a recent important suit to foreclose a railroad mortgage the following order was made: "That all outstanding debts of the said railway company for labor, materials, and supplies used in the equipment or permanent improvement of the said railroad, and all outstanding debts for necessary operating and managing expenses thereof in the ordinary course of its business, incurred after the first day of September, 1883, shall be allowed by the master as equitable liens, prior in right to the lien of the mortgage sued on, irrespective of statutory liens therefor. And it is further ordered that all such claims accruing on open running accounts between said railroad and its creditors shall be considered as embraced within this order, if any part of the work was done, materials furnished, or expenses incurred after the first day of September, 1883, on subsisting contracts necessary for the continued operation of the road by said receiver; otherwise the demand will be limited to what accrued subsequent to September first," at which date the default in payment of interest upon the mortgage occurred.⁵⁵ This order was, subsequently, thus expounded: "The various rulings of the court with respect to betterments and wages, not within the respective times stated, — to wit, six months or otherwise, — have rested upon this distinct proposition: That supplies furnished or services performed under a *subsisting* contract, to which and to the continuance of which the parties were respectively bound, and the termination of said contract did not happen except within the time limited; or when such a continuing contract was still in force at the appointment of a receiver,

⁵¹ *Burnham v. Bowen*, 111 U. S. 776. See also *Central Trust Co. v. Texas & St. L. Ry. Co.*, *In re Waters Pierce Oil Co.*, Intervenor, 23 Fed. R. 703.

⁵² *Burnham v. Bowen*, 111 U. S. 776.

⁵³ *Union Trust Co. v. Walker*, 107 U. S. 596; *Burnham v. Bowen*, 111 U. S. 776.

⁵⁴ *In re Kelly v. Green Bay & Minn. R. Co.*, 5 Fed. R. 846. See *Morgan's L.*

& *C. R. R. & S. S. Co. v. Texas Central Ry. Co.* 137 U. S. 171.

⁵⁵ Treat, J., in *Central Trust Co. v. Texas & St. L. Ry. Co.*, 23 Fed. R. 703; cited and followed by Brewer, J., in *Clair v. St. Louis, H. & K. Ry. Co.*, *In re Merriwether and others*, Intervenor, 23 Fed. R. 704, 705.

the items of such continuing and subsisting contracts would fall within the prescribed rules. No other demands, independent in their nature, incurred before the prescribed time, are to be treated other than as credits at large. If this ruling is enforced there need be no difficulty with respect to what are called 'open and current' accounts. Such accounts must be under subsisting contracts, not to be terminated until within the period of time named; otherwise all items previous to that time must be rejected. This ruling may be subject to an exception where the local statute gives a lien under a different limitation. In the latter cases difficulties may arise if local decisions are followed, each one of which must depend upon its special facts."⁵⁶ It has been held that pending a receivership in a Federal court, where parties are entitled to a lien, and can secure it by proceedings under a State statute, they are not required to go to the expense of such proceedings, but the Federal court will treat it as though all needful steps had been taken to establish the lien;⁵⁷ and that "where like demands are presented from other States in which no statutory lien therefor exists, they shall be entitled to the same *status*, so that statutory and equitable liens may rest on a like basis."⁵⁸ An entry upon the books of the mortgagor showing the claim to be good is, in the absence of suspicious circumstances, *prima facie* proof.⁵⁹ The attorneys of both the receiver and the complainant should have notice of the hearing of such a claim before a master.⁶⁰ An order directing a receiver to carry out his corporation's contracts does not necessarily give those who claim damages for a breach of those contracts a preference over lien-holders.⁶¹ In a recent case, the following conditions were inserted in the order appointing a receiver: "(1) That the debts, if any, due from the railroad company for ticket and freight balances: and for work and labor performed by its employes and laborers: and for supplies and materials furnished for equipping,

⁵⁶ Treat, J., as quoted by Brewer, J., in *Central Trust Co. v. Texas & St. L. Ry. Co., Camden Lumber Co. and others, Intervenor*s, 23 Fed. R. 673.

⁵⁷ Brewer J., in *Central Trust Co. v. Texas & St. L. Ry. Co., Camden Lumber Co. and others, Intervenor*s, 23 Fed. R. 673, 674, 675; Treat, J., in *Blair v. St. Louis, H. & K. R. Co.*, 19 Fed. R. 861. But see *Hassall v. Wilcox*, 130 U. S. 493.

⁵⁸ Treat, J., in *Blair v. St. Louis, H. & K. R. Co.*, 19 Fed. R. 861, 862.

⁵⁹ *Blair v. St. Louis, H. & K. R. Co.*, 19 Fed. R. 861, 862; Treat, J.; s. c. 22 Fed. R. 471, 472, Brewer, J.

⁶⁰ *Blair v. St. Louis, H. & K. R. Co.*, 19 Fed. R. 861, 862.

⁶¹ *Olyphant v. St. St. Louis Ore & Steel Co.*, 28 Fed. R. 729.

operating, repairing, or improving the road; and all obligations incurred in the transportation of passengers and freight, or for injuries to person or property, which have accrued within six months last past, — shall be paid by the receiver out of the earnings of the road. (2) That persons having demands or claims of any character against the receiver, may, without applying to this court for leave to do so, bring suit thereon against the receiver in any court in this State having jurisdiction, or may file their petition and have their claim adjudicated in this court at their election. This clause shall not be construed as authorizing the levy of any writ or process on the property in the hands of the receiver, or taking the same from his custody or possession. (3) That the debts and liabilities of the railroad company which the receiver is ordered to pay, together with all debts and liabilities which said receiver may incur in operating said road, shall be paramount and superior to the lien of the mortgages set out in the plaintiff's bill, and said lien shall continue until said debts and liabilities are satisfied; and the discharge of said property from the custody of the receiver shall not affect such lien, or deprive claimants of the opportunity of proving their demands, but said receiver or a successor shall be continued in office for the adjustment of such demands, and may be sued therefor; and if said demands are not paid by the person or corporation in possession of said mortgaged property, the court may repossess or may decree a sale of the property, as shall seem most expedient. (4) The said plaintiff shall prosecute this suit to final decree as speedily as the same can be done under the rules of equity practice, and failing so to do, the court of its own motion will discharge said property from the custody of the receiver." ⁶²

Another recent order was as follows: "On this day comes the plaintiff, by Phillips and Stewart, its attorneys, and the defendant, by J. M. & J. G. Taylor, its attorneys, and the receivers, by S. H. West, their attorney, and S. W. Fordyce, one of the receivers, in proper person, and the proper order to be made by the court on the subject of the payment of debts and liabilities of the defendant company by the receivers came up for consideration; and, the court being now well and sufficiently advised in the premises, it is ordered that the following debts and demands against the company which have accrued since the execution of the mortgages

⁶² Caldwell, J., in *Dow v. Memphis & L. R. Ry. Co.*, 20 Fed. R. 250, 256, 257.

in suit; viz., the debts due from the railroad company for tickets and freight balances, and for work, labor, materials, machinery, fixtures, and supplies of every kind and character, done, performed, or furnished in the construction, extension, repair, equipment, or operation of said road and its branches in this State, and all liabilities incurred by said company in the transportation of freight and passengers, including damages to person and property, and for breaches of contracts for the transportation of persons and property, and all claims and demands upon which suit has been heretofore brought or judgment recovered in the United States or State court in this State, together with all debts and liabilities which the receivers may incur in operating said road in this State, including claims for injuries to persons and property, — shall constitute a lien on said railroad, and all property appurtenant thereto, superior and paramount to the lien of the mortgages set out in the bill, as provided by the statute of this State, and said road shall not be released or discharged from said lien until said debts and liabilities are paid. The receivers are authorized and directed to pay all such debts and liabilities out of the earnings of the road, or out of any fund in their hands applicable to that purpose; and, if not sooner discharged, then the same shall be paid out of the proceeds of the sale of the road.”⁶³ Whether this doctrine applies to the foreclosure of any except mortgages by railway, telegraph, or other companies to which are delegated the right of eminent domain, is very doubtful.⁶⁴

§ 244. **Property over which Receivers may be Appointed.** — A receiver may be appointed to preserve and take possession of every kind of property, whether the same be what is termed corporeal or incorporeal, which can be seized by execution at law or which constitutes equitable assets.¹ Thus receivers have been appointed to collect and hold the profits of a rectory,² of a col-

⁶³ *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, 41 Fed. R. 551, 553-554, *per* Caldwell, J.

⁶⁴ *Wood v. Guarantee Trust & Safe Deposit Co.*, 128 U. S. 416; *Raht v. Attrill*, 106 N. Y. 423; *Reyburn v. Consumers' Gas, Fuel & Light Co.*, 29 Fed. R. 561; *Fidelity Ins. & Safe Deposit Co. v. Shenandoah Iron Co.*, 42 Fed. R. 372; *Seventh Nat. Bank of Phila. v. Shenandoah Iron Co.*, 35 Fed. R. 436

§ 244. ¹ *Davis v. Gray*, 16 Wall. 203, 217; *Davis v. Duke of Marlborough*, 2 Swanst. 108, 127; *Blanchard v. Cawthorne*, 4 Simons, 566. See *Palmer v. Vaughan*, 3 Swanst. 173; *Meriwether v. Garrett*, 102 U. S. 472, 501.

² *Silver v. Bishop of Norwich*, 3 Swanst. 112; *White v. Bishop of Peterborough*, 3 Swanst. 109.

lege fellowship,³ and of the offices of a master forester in a royal forest,⁴ and of a county clerk of peace,⁵ the tolls of a turnpike;⁶ to manage and collect the profits of mines,⁷ plantations,⁸ a theatre,⁹ a newspaper,¹⁰ and a railroad;¹¹ to exercise the right to sell a conditional right of membership in an exchange;¹² and to take possession of the estate of an intestate with power to apply for letters of administration.¹³ After the repeal of the charter of the city of Memphis, a receiver was appointed to take possession of all its property which could be subjected to the payment of its debts.¹⁴ In the last-mentioned case the Supreme Court laid down the following propositions: "1. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing-places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally everything held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city, such property passed under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn. 2. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the States, that such property can be reached directly on execution against the municipality, has not been generally accepted. 3. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature. 4. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be col-

³ *Feistel v. King's College*, 10 Beav. 491.

⁴ *Blanchard v. Cawthorne*, 4 Simons, 566.

⁵ *Palmer v. Vaughan*, 3 Swanst. 173.

⁶ *Knapp v. Williams*, 4 Ves. 430, note; *Dunville v. Ashbrooke*, 3 Russ. 98, note.

⁷ *Jefferys v. Smith*, 1 J. & W. 298.

⁸ *Morris v. Elme*, 1 Ves. Jr. 139.

⁹ *Const v. Harris*, T. & R. 496, 528.

¹⁰ *Chaplin v. Young*, 6 L. T. (N. S.) 97; *Kelley v. Hutton*, 17 W. R. 425.

¹¹ *Stevens v. Davison*, 18 Grat. (Va.) 819; *Davis v. Gray*, 16 Wall. 203; *Barton v. Barbour*, 104 U. S. 126.

¹² *Powell v. Waldron*, 89 N. Y. 328; *In re Ketchum*, 1 Fed. R. 840; *In re Werder*, 15 Fed. R. 789; *Hyde v. Woods*, 94 U. S. 523; *Platt v. Jones*, 96 N. Y. 24.

¹³ *Re Mayer*, L. R. 3 P. & M. 39.

¹⁴ *Meriwether v. Garrett*, 102 U. S. 472, 484.

lected through the instrumentality of a court of chancery at the instance of creditors of the city. Such taxes can only be collected under authority from the legislature. If no such authority exists, the remedy is by appeal to the legislature, which alone can grant relief. Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it."¹⁵ In a subsequent case, the Supreme Court held that taxes already levied could in no case be collected through a receiver.¹⁶ Until the passage of a statute allowing it to be done, the English courts held that a receiver could not be appointed to manage a railroad;¹⁷ but such an appointment is authorized and is very frequent in this country,¹⁸ and even in England a receiver might always be appointed to receive the tolls of a railroad.¹⁹ A lugubrious picture of the result of such appointments has been drawn by Mr. Justice Miller: "The rapid absorption of the business of the country of every character by corporations, while productive of much good to the public, is beginning also to develop many evils, not the least of which arises from their failure to pay debts and perform the duties which by the terms of their organization they assumed. One of the most efficient remedies for the failure to pay, when it arises from inability, is to place the corporation in the hands of a receiver, that its affairs may be wound up, its debts discharged, and the remaining assets, if any there be, distributed among its stockholders. Of the beneficial results of this remedy there can be little doubt. When it is applied with despatch, and the effects of the insolvent corporation are faithfully used to meet its liabilities, and its dead body is buried out of sight as soon as possible, no objection can be made to the procedure, and all courts and good citizens should contribute, as far as they may, to this desirable object. In regard, however, to a

¹⁵ Chief Justice Waite in *Meriwether v. Garrett*, 102 U. S. 472, 501. Upon the first three propositions the court was unanimous. The fourth was decided by a majority only. See a criticism of this case by Judge Baxter in *Garrett v. City of Memphis*, 5 Fed. R. 860.

¹⁶ *Thompson v. Allen County*, 115 U. S. 550, 558.

¹⁷ *Gardner v. London, Chatham & Dover Ry. Co.*, L. R. 2 Ch. App. 201; *Jones on Railroad Securities*, § 456.

¹⁸ *Stevens v. Davison*, 18 Grat. (Va.) 819; *Davis v. Gray*, 16 Wall. 203; *Barton v. Barbour*, 104 U. S. 126, 137, 138.

¹⁹ *Hopkins v. Worcester & Birmingham Canal Co.*, L. R. 6 Eq. 437; *Jones on Railroad Securities*, § 456.

certain class of corporations, — a class whose operations are as important to the interests of the community and as intimately connected with its business and social habits as any other, — the appointment of receivers, as well as the power conferred on them, and the duration of their office, has made a progress which, since it is wholly the work of courts of chancery and not of legislatures, may well suggest a pause for consideration. It will not be necessary to any observing mind to say that I allude to railroad corporations. Of the fifty or more who own or have owned the many thousand miles of railway in my judicial circuit, I think I speak within limits in saying that hardly half a dozen have escaped the hands of the receiver. If these receivers had been appointed to sell the roads, collect the means of the companies, and pay their debts, it might have been well enough; but this was hardly ever done. It is never done now. It is not the purpose for which a receiver is appointed. He generally takes the property out of the hands of its owner, operates the road in his own way, with an occasional suggestion from the court, which he recognizes as a sort of partner in the business, sometimes, though very rarely, pays some money on the debts of the corporation, but quite as often adds to them, and injures prior creditors by creating a new and superior lien on the property pledged to them.”²⁰ In a recent case, the court refused to appoint a receiver of a disused and independent railroad track in a case where there was a scramble for its possession: saying, in reference to the power to appoint a receiver: “If we should carry this to the extent to which you claim, we should be having this court pushing the doctrine of receivership to the extent of making us justices of the peace, and issuing peace warrants.”²¹

§ 245. **Powers of Receivers in general.** — The powers of a receiver, in the absence of any special authority given in the order for his appointment, are very limited. He can take possession of the property which he is appointed to receive.¹ If any of it is land under lease, he can accept attornment and payment of rent and arrears of rent from the tenants.² He can give notice to quit to tenants from year to year:³ and in States where the remedy by

²⁰ *Barton v. Barbour*, 104 U. S. 126, 137, 138, in the dissenting opinion.

²¹ *Brewer and Treat, J.J., in St. Louis, K. C. & C. R. R. Co. v. Dewees*, 23 Fed. R. 519.

§ 245 ¹ *Daniell's Ch. Pr.* (2d Am. ed.) 1987, 1988.

² *Codrington v. Johnstone*, 1 Beav. 520; *McDonnell v. White*, 11 H. L. C. 570.

³ *Doe v. Reed*, 12 East, 57, 59.

distress still exists, he may distrain for rents not more than one year in arrear.⁴ He may also pay out small sums of money in customary repairs of the property which he holds in trust,⁵ and in some cases insure it against fire.⁶ Beyond this, he can do nothing without the express authority of the court.⁷ He cannot sue to recover debts or other property belonging to the estate,⁸ nor even, it seems, defend suits or actions brought against him,⁹ nor spend any money whatever which belongs to the estate, except such very small sums as are above referred to,¹⁰ without an order authorizing him to do so. If, however, he does any of these things without leave, and the court determines that the money thus expended has been beneficial to the estate, his expenditures for that purpose may be allowed him;¹¹ otherwise, he must make good all loss thereby occasioned.¹² It seems that an unauthorized contract made by him with a stranger may be ratified by an order of the court made before the stranger has given notice of his intention to abandon it.¹³ A fire insurance company which has received a premium from a receiver cannot in an action on the policy dispute his authority to insure the property he holds.¹⁴ It seems that an order giving a receiver authority to sell carries with it authority to execute and deliver to the purchaser a deed;¹⁵ but if not, a subsequent confirmation by the court of a sale irregularly made validates from that time a deed previously executed by the receiver.¹⁶ It has been said that "a purchaser under a deed from a receiver is not bound to examine all the proceedings in the case in which the receiver is appointed. It is sufficient for him to see that there is a suit in equity, or was one, in which the court appointed a receiver of property; that such receiver was au-

⁴ *Pitt v. Snowden*, 3 Atk. 750; *Brandon v. Brandon*, 5 Madd. 473; *Davis v. Gray*, 16 Wall. 203, 218.

⁵ *Attorney-General v. Vigor*, 11 Ves. 563; *Dantell's Ch. Pr.* (2d Am. ed.) 1990.

⁶ *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 293-294; *Brown v. Hazlehurst*, 54 Maryland, 26, 28.

⁷ *Davis v. Gray*, 16 Wall. 203, 218; *Smith v. McCullough*, 104 U. S. 25, 29.

⁸ *Wynne v. Lord Newborough*, 1 Ves. Jr. 164; s. c. 3 Brown Ch. C. 88; *Green v. Winter*, 1 J. Ch. (N. Y.) 60.

⁹ *Swaby v. Dickon*, 5 Simons, 629.

¹⁰ *Attorney-General v. Vigor*, 11 Ves. 563.

¹¹ *Tempest v. Ord*, 2 Meriv. 55; *Blunt v. Clitherow*, 6 Ves. 799; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 294.

¹² *Attorney-General v. Vigor*, 11 Ves. 563.

¹³ *Koontz v. Northern Bank*, 16 Wall. 196; *Smith v. McCullough*, 104 U. S. 25, 29.

¹⁴ *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287, 294-295.

¹⁵ *Koontz v. Northern Bank*, 16 Wall. 196, 201.

¹⁶ *Koontz v. Northern Bank*, 16 Wall. 196.

thorized by the court to sell the property; that a sale was made under such authority; that the sale was confirmed by the court; and that the deed accurately recites the property or interest thus sold. If the title of the property was vested in the receiver by an order of the court, it would in that case pass to the purchaser. He is not bound to inquire whether any errors intervened in the action of the court, or irregularities were committed by the receiver in the sale, any more than a purchaser under execution upon a judgment is bound to look into the errors and irregularities of a court on the trial of the case, or of the officer in enforcing its process."¹⁷ An order authorizing a receiver to borrow money to expend in building an unfinished portion of a railroad does not authorize him to contract for municipal aid in such construction.¹⁸ An order authorizing a receiver to make a contract is construed strictly in favor of the estate.¹⁹ After the execution of a contract has been authorized by the court, the order will not ordinarily be revoked except in case of fraud.²⁰ A receiver cannot accomplish by estoppel or waiver what he has no power to do directly.²¹ Without authority from the court a receiver cannot by receipt of rent or otherwise bind the parties or a subsequent purchaser to recognize a lease.²² The court may, however, either in the original order of appointment or subsequently, give a receiver very extensive powers. It is usual in the order appointing a receiver to give him power to bring and defend suits or actions affecting the estate, and to set and let such of it as consists of land. Other and much more extensive authority, such as to borrow money needed for the proper administration of his trust, and issue as security therefor certificates giving their owner a first lien upon the estate;²³ to contract for the construction of a bridge;²⁴ to pay an employee his wages during the time that he is kept from work by the result of an

¹⁷ Mr. Justice Field in *Koontz v. Northern Bank*, 16 Wall. 196, 202.

¹⁸ *Smith v. McCullough*, 104 U. S. 25, 29.

¹⁹ *Farmers' L. & Tr. Co. v. Logansport, C. & S. W. Ry. Co.*, 4 Fed. R. 184.

²⁰ *Wabash, St. L. & P. Ry. Co. v. Central Trust Co.*, 22 Fed. R. 269. But see *Weeks v. Weeks*, 106 N. Y. 626.

²¹ *Van Dyck v. McQuade*, 85 N. Y. 616; *Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co.*, 44 Fed. R. 653, 659. But see

Central Trust Co. v. Ohio Central R. R. Co., 23 Fed. R. 306; *Armstrong v. Armstrong, L. R.* 12 Eq. 614; *Koontz v. Northern Bank*, 16 Wall. 196; *Stanton v. Ala. & C. R. Co.*, 31 Fed. R. 585.

²² *Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co.*, 44 Fed. R. 653, 659.

²³ *Wallace v. Loomis*, 97 U. S. 146. See § 247.

²⁴ *LaCrosse Railroad Bridge*, 2 Dill. 465.

injury received while at work for the receiver, without contributory negligence, but for which the receiver is not responsible;²⁵ and in Ireland, to spend money in relieving and giving employment to poor tenants, for the reason that they may be enabled in the future to pay their rent more regularly.²⁶ have been given to receivers. The order appointing a receiver of land usually contains a clause empowering him to set and let the same.²⁷ Even with this, it seems, that without special authority he cannot let any part thereof so as to bind the estate for a longer period of time than is authorized by the Statute of Frauds.²⁸ but that a lease made for a longer time would bind a tenant who had accepted it.²⁹ It is doubtful whether a receiver has the right to use a patent under a license given the person over whose estate he was appointed.³⁰ A receiver of a dissolved corporation may sustain a bill to compel the assignment to him of a patent by the legal owner when the corporation had the equitable title to the same.³¹

§ 246. **Powers of Receivers of Railroads.**— Very extensive powers are often granted to the receivers of railroads.¹ The Supreme Court has said of them: "In the progress and growth of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred. In some of the States they are by statutes charged with the duty of settling the affairs of certain corporations when insolvent, and are authorized expressly to sue in their own names. It is not unusual for courts of equity to put them in charge of the railroads of companies which have fallen into financial embarrassment, and to require them to operate such roads, until the difficulties are removed, or such arrangements are made that the roads can be sold with the least sacrifice of the interests of those concerned. In all such cases the receiver is the right arm of the jurisdiction invoked. As regards the statutes, we see no reason why a court of equity, in the exercise of its undoubted authority, may not

²⁵ *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, 33 Fed. R. 701; s. c. *Blaener Intervenor*, 41 Fed. R. 319.

²⁶ *Jackson v. Jackson*, 2 Hogan, 238.

²⁷ *Daniell's Ch. Pr.* (2d Am. ed.) 1989.

²⁸ *Kerr on Receivers* (2d Am. ed.), 210, 211.

²⁹ *Dancer v. Hastings*, 4 Bingham, 2; *Kerr on Receivers* (2d Am. ed.), 211.

³⁰ Compare *Montross v. Mabie*, 30 Fed. R. 234; with *Curran v. Craig*, 22 Fed. R. 101.

³¹ *McCulloh v. Association Horlgérie Suisse*, 45 Fed. R. 479.

§ 246. ¹ *Davis v. Gray*, 16 Wall. 203, 219, 220; *Cowdrey v. Railroad Co.*, 1 Woods, 331, 335.

accomplish all the best results intended to be secured by such legislation, without its aid.”² And in a carefully considered opinion, Mr. Justice Bradley said: “It may be laid down as a general proposition, that all outlays made by the receiver in good faith, in the ordinary course, with a view to advance and promote the business of the road, and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to a receiver entrusted with the management and operation of a railroad in his hands. His duties, and the discretion with which he is invested are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. And to such outlays in ordinary course may properly be referred, not only the keeping of the road, buildings, and rolling stock in repair, but also the providing of such additional accommodations, stock, and instrumentalities as the necessities of the business may require, always referring to the court, or to the master appointed in that behalf, for advice and authority in any matter of importance, which may require a considerable outlay of money in lump; and except in extraordinary cases, the submission by the receiver of his accounts to the master at frequent intervals, whereby the latter may ascertain from time to time the character of the expenditures made, and disallow whatever may not meet with his approval, will be regarded as a sufficient reference to the court for its ratification of the receiver’s proceedings. In extraordinary cases, involving a large outlay of money, the receiver should always apply to the court in advance and obtain his authority for the purchase or improvement proposed.”³ This language has been thus construed in a case in a State court: “This rule, it will be observed, simply prescribes what expenditures, out of the fund in his hands as receiver, the court will recognize as legitimate and proper when the receiver comes to account for the administration of his trust, but nothing here said gives the slightest support to the notion that the receiver may, in virtue of the power of his office, make a contract, without the authority of the court, which will bind the trust, or which the court will be bound to recognize without regard to its necessity or propriety. A receiver may, undoubtedly, appropriate moneys in his hands

² Mr. Justice Swayne in *Davis v. Gray*,
16 Wall. 203, 219, 220.

³ *Cowdrey v. Railroad Co.*, 1 Woods,
331, 336.

belonging to the trust, to such purposes, connected with the trust, as he may think proper, always taking the risk that the court will finally approve his action, but he has no authority to bind the trust by contract without the authority of the court. Until his contracts are approved or ratified by the court, the court is at liberty to deal with them as to it shall appear to be just, and may either modify them or disregard them entirely. This, in my judgment, is the only safe rule which can be adopted.”⁴ A loan to a receiver whom the court has not authorized to borrow money will be denied priority.⁵ A receiver cannot make a permanent traffic agreement without the authority of the court.⁶ It has been held that the court has power to authorize the receiver of a railroad company under proceedings for a foreclosure, to ratify a contract previously made by the corporation giving a telegraph company certain privileges upon its road, and that the contract thus ratified will be binding upon purchasers of the railroad at a foreclosure sale.⁷ A receiver may be authorized to complete the construction of a line of railroad, and to borrow money for that purpose.⁸ A receiver of a railroad may be authorized to purchase a lien upon part of its property, and to assume a lease of a connecting railway.⁹ The rules which should regulate a receivership of a consolidated railroad holding leased lines with separate mortgages upon the different branches, as well as a general mortgage upon the whole system, have been recently stated and applied in an opinion of Judge Brewer, delivered when denying an application by a receiver of such a system of railroads for leave to reject such leased roads as were unprofitable: “This Wabash road is composed of many subdivisions. While it is a single corporation to-day, yet into it have passed many corporations and many separate railroad properties. In administering such a consolidated property, the court must look at, not merely

⁴ Van Fleet, V. C., Chancellor Runyon, concurring, *Lehigh Coal & Navigation Co. v. Central R. R. of N. J.*, 35 N. J. Eq. 426, 429. To a similar effect is *Union Trust Co. v. Ill. Midland Ry. Co.*, 117 U. S. 434.

⁵ *Union Trust Co. v. Ill. Midland Ry. Co.*, 117 U. S. 434, 477.

⁶ *Investment Co. of Phila. v. Ohio & N. W. Ry. Co.*, 4 Fed. R. 378.

⁷ *W. U. Tel. Co. v. Atlantic & Pacific Tel. Co.*, 7 Biss. 327.

⁸ *Kennedy v. St. Paul & P. Ry. Co.*, 2

Dill. 448. See also *Smith v. McCullough*, 104 U. S. 25; *Allen v. The Dallas & Wichita R. R. Co.*, 3 Woods, 316.

⁹ *Farmers' Loan & Trust Co. v. Burlington & S. W. Ry. Co.*, 32 Fed. R. 805. See also *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, *Gilman Invervenor*, 34 Fed. R. 259; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 23 Fed. R. 863; *Easton v. Huston & T. C. Ry. Co.*, 38 Fed. R. 784.

the interest of the mortgagee in this general mortgage, or of the mortgagor as a single entity or corporation, but also the separate and sometimes conflicting interests of the various subdivisions and their respective incumbrances, and, back of all that, the duty which every railroad corporation owes to the public. For underlying the rule which the Supreme Court has laid down in respect to the payment, by receivers when they take possession of the railroad property, of prior unsecured debts recently accrued, runs the thought, as expressed by the Supreme Court, that a railroad corporation owes a duty to the public, which has given it its franchise and enabled it to construct its road, — the duty of operating that road for the benefit of the public. While that may not be what you call an absolute duty, enforceable under all circumstances, it is still a duty to be regarded and enforced by the courts when they take possession of railroads through their officers. And that duty is not limited to the operation of merely that particular fragment of a road which is pecuniarily profitable in its operations, but it extends to the road as an entirety, and to all its branches, — all its parts ; differing in that particular from the duty which would rest upon the court if it had simply taken possession of property used for private purposes, manufacturing or otherwise, where the single question might well be said to be one of pecuniary profit. This Wabash road, as a system, was in operation, a going concern, from one end to the other ; as such, discharging its duties as best it could to its various creditors. This court, at the instance of the corporation, and to preserve the integrity of the system, took possession of it by its receivers. It took possession of it as a going concern, and, so far as is reasonable and practicable, it should continue it as a going concern, until it surrenders it to whoever may be the purchasers or future holders of it. With that preface, and calling these separate branches which have passed into this consolidated road, subdivisions, since some have passed in by way of lease and others by way of consolidation, subject to separate mortgages, we pass orders substantially as follows : The first is one which has already been entered, and we simply emphasize it by repeating it, that subdivisinal accounts must be kept separately. That was an order passed by Brother Treat at the very outset of this receivership, in order that the particular equities of each one of these divisions, as between themselves, might be ascertained.

2. Where any subdivision earns a surplus over expenses, the rental or subdivisional interest will be paid to the extent of the surplus, and only to the extent of the surplus. Any part diversion of such surplus for general operating expenses will be made good at once, and, if need be, by the issue of receiver's certificates. . . . 3. Where a subdivision earns no surplus,—simply pays operating expenses,—no rental or subdivisional interest will be paid. If the lessor or the subdivisional mortgagee desires possession or foreclosure, he may proceed at once to assert his rights. While the court will continue to operate such subdivision until some application be made, yet the right of a lessor or mortgagee whose rent or interest is unpaid to insist upon possession or foreclosure will be promptly recognized. That, it is true, may work a disruption of the system, as evidenced by the movement just made in respect to this Cairo division; but the proceeding for disruption will come from the subdivisions. The court is not sloughing off branches, tearing the system in two; but the disruption, if it comes, will come from those who seek separation, and have a legal right so to do. 4. Where a subdivision not only earns no surplus, but fails to pay operating expenses, as in the St. Joseph & St. Louis branch, the operation of the subdivision will be continued, but the extent of that operation will be reduced with an unsparing though a discriminating hand; that is, if a subdivision does not earn operating expenses, and the receivers are running two trains a day, then lop one of them off. If they are running one train a day, and still it does not pay, then run one train in two days. While the court will endeavor to keep that subdivision in operation, it will make the burden of it to the consolidated corporation, and to all the other interests put into that consolidated corporation, a minimum.”¹⁰ In the same case, Judge Woods subsequently rejected a claim to a preference over the mortgage for rents accrued pending a receivership, in a suit in which the mortgagee had been denied the extension of the receivership for his benefit.¹¹ The court may, without notice to the mortgagee, authorize a receiver to acquire by lease another railroad.¹²

¹⁰ Brewer, J., Treat, J., concurring; in *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 23 Fed. R. 863, 865-857. But see *s. c.* *Swayne Intervenor*, 46 Fed. R. 26.

¹¹ *Central Trust Co. v. Wabash, St. L. & P. Ry. Co., Swayne Intervenor*, 46 Fed. R. 26.

¹² *Mercantile Trust Co. v. Missouri, K. & T. Ry. Co.*, 41 Fed. R. 8, 11, 12.

§ 247. **Receivers' Certificates.** — Where it is absolutely necessary to raise money for the preservation of the property in his hands, a receiver may be empowered by the court to issue certificates which give their owners a lien upon the property prior to that held by any persons except those whose claims are paramount to the rights of the parties to the suit.¹ Such certificates are usually issued only in suits for the foreclosure of railroad or telegraph mortgages, in order to raise money for repairs, or to defray operating expenses,² or to discharge claims having an equitable preference to that of the party at whose instance the receiver was appointed,³ or to restore to the rightful owners so much of the income as the receiver has improperly applied to the foregoing purposes.⁴ In a few cases, receivers have been authorized thus to borrow money in order to complete the construction of railroads, and save from forfeiture land grants and municipal subscriptions.⁵ Certificates have been issued to pay interest upon a divisional mortgage prior to that to foreclose which the suit was brought.⁶ Where the net earnings of a railroad are sufficient to defray current expenses, the court will not authorize the issue of receivers' certificates merely for the sake of paying interest upon the mortgage under foreclosure.⁷ It has been said to be doubtful whether the court has the power to authorize a receiver to issue car-trust certificates secured by a lien upon the cars which are thus bought, and payable in ten annual instalments.⁸ An order authorizing the issue of receivers' certificates to pay "wages and freights due and to become due," does not authorize

§ 247. ¹ *Meyer v. Johnston*, 53 Ala. 237; *Jerome v. McCarter*, 94 U. S. 734; *Wallace v. Loomis*, 97 U. S. 146; *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286; *Stanton v. Ala. & Chattanooga Ry. Co.*, 2 Woods, 506; s. c. 31 Fed. R. 585; *Kennedy v. St. Paul & P. R. R. Co.*, 2 Dill. 448; *Hoover v. Montclair & Greenwood Lake R. R. Co.*, 29 N. J. Eq. 4; *Coe v. N. J. Midland Ry. Co.*, 27 N. J. Eq. 37; *Union Trust Co. v. Illinois Midland Ry. Co.*, 117 U. S. 434.

² *Jerome v. McCarter*, 94 U. S. 734; *Wallace v. Loomis*, 97 U. S. 146; *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286.

³ *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286; *Taylor v. Phila. & Read-*

ing R. R. Co., 7 Fed. R. 377; *Skiddy v. Atlantic, M. & O. R. R. Co.*, 3 Hughes, 320.

⁴ *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 23 Fed. R. 863.

⁵ *Kennedy v. St. Paul & P. R. R. Co.*, 2 Dill. 448; *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286, 294, 295. See also *Smith v. McCullough*, 104 U. S. 25, 29. But see *Investment Co. v. Ohio & N. W. R. Co.*, 36 Fed. R. 48.

⁶ *Skiddy v. Atlantic, Miss. & O. R. R. Co.*, 3 Hughes, 320, 341.

⁷ *Taylor v. Phila. & Reading R. R. Co.*, 9 Fed. R. 1.

⁸ *Taylor v. Phila. & Reading R. R. Co.*, 9 Fed. R. 1.

the issue of a certificate to pay money advanced to pay wages by honoring "store orders."⁹ The power of courts of equity to issue receivers' certificates is of modern origin,¹⁰ has been severely criticised,¹¹ and should be exercised with great reluctance.¹² A judge who had never authorized the issue of a receiver's certificate, said: "When the road cannot be kept running without its exercise, except to a limited extent, the safe and sound practice is to discharge the receiver, or stop running the road and speed the foreclosure."¹³ Without leave from the court, a receiver has no power to pledge the trust estate, nor to make a contract for a loan of money which will bind the estate¹⁴ or even the proposed lender.¹⁵ An order for the issue of receivers' certificates is usually granted only upon notice to all parties in interest.¹⁶ Those who have not received notice may move to set aside the order and to cancel the certificates, if they act as soon as they learn what was done.¹⁷ A very short delay after knowledge that such an order has been granted will estop a party from objecting to the validity of certificates issued in pursuance of it.¹⁸ Receivers' certificates are assignable, but not negotiable.¹⁹ It has been said that the power to issue them is a personal one which the receiver cannot delegate.²⁰ Where a receiver issued a certificate to a person named therein as payee, for negotiation and sale, and the latter never paid over any money on account of it; a purchaser of the

⁹ *Fidelity Ins. & Safe Deposit Co. v. Shenandoah Iron Co.*, 42 Fed. R. 372, 377.

¹⁰ *Meyer v. Johnson*, 53 Ala. 237; *Coe v. N. J. Midland Ry. Co.*, 27 N. J. Eq. 37; *Hoover v. Montclair & Greenwood Lake Ry. Co.*, 29 N. J. Eq. 4; *Jerome v. McCarter*, 94 U. S. 734; *Wallace v. Loomis*, 97 U. S. 146.

¹¹ *Barton v. Barbour*, 104 U. S. 126, 138; *Credit Co. of London v. Arkansas Cent. R. R. Co.*, 15 Fed. R. 46.

¹² *Wallace v. Loomis*, 97 U. S. 146, 163; *Shaw v. Railroad Co.*, 100 U. S. 605, 612; *Taylor v. Phila. & Reading R. R. Co.*, 9 Fed. R. 1; *Credit Co. of London v. Arkansas Cent. R. R. Co.*, 15 Fed. R. 46.

¹³ *Caldwell, J.*, in *Credit Co. of London v. Arkansas Cent. R. R. Co.*, 15 Fed. R. 46, 49.

¹⁴ *Union Trust Co. v. Ill. Midland Ry. Co.*, 117 U. S. 434.

¹⁵ *Smith v. McCullough*, 104 U. S. 25, 29.

¹⁶ *Ex parte Mitchell*, 12 S. C. 83. But see *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286, 297, 298.

¹⁷ *Hervey v. Ill. Midland Ry. Co.*, 23 Fed. R. 169.

¹⁸ *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286; *Union Trust Co. v. Ill. Midland Ry. Co.*, 117 U. S. 434.

¹⁹ *Union Trust Co. of N. Y. v. Chicago & Lake Huron R. R. Co.*, 7 Fed. R. 513; *Stanton v. Ala. & C. R. R. Co.*, 31 Fed. R. 585; *Turner v. Peoria & Springfield R. R. Co.*, 95 Ill. 134; *Stanton v. Ala. & C. R. R. Co.*, 2 Woods, 506; s. c. 31 Fed. R. 585; *Central Nat. Bank v. Hazard*, 30 Fed. R. 484.

²⁰ *Union Trust Co. of N. Y. v. Chicago & Lake Huron R. R. Co.*, 7 Fed. R. 513.

certificate at much less than par, who was unable to prove that the person from whom he bought it had paid anything therefor to the person named as payee, was not allowed to receive anything from the receiver on account of the same.²¹ The purchaser at a judicial sale made subject to the payment of receivers' certificates cannot contest their validity.²² A receiver is personally responsible for a fraudulent statement in a certificate which he issues.²³ In at least one case, the court ordered the receiver to execute a mortgage to secure the receivers' certificates.²⁴ But, ordinarily, the order for the issue of the certificates provides that they shall constitute a lien upon the property superior to all prior incumbrances, which is sufficient.²⁵ In one case the order simply stated that the certificates should be payable out of the income of the property, and "be provided for by this court in its final order in said cause, unless paid by the receiver out of the income of said road as aforesaid."²⁶ A receiver appointed in a suit for the foreclosure of a second railroad mortgage may be authorized to issue certificates constituting a prior lien to that of the first mortgage, provided the mortgagor is in default as to that, and the first mortgagee is a party to the suit.²⁷ An order authorizing the issue of receivers' certificates is appealable to the Supreme Court of the United States.²⁸

§ 248. **Advice to Receivers.**—Receivers may apply to the court for instructions and advice, both generally and in particular cases.¹ "The value of such advice depends: If there are parties in interest, and they have their day in court, the advice may be decisive. But if the matter is *ex parte* the value of the advice depends largely upon the information and ability of the judge, and is probably binding only on the receivers, for the judge may change his mind on hearing full argument."² It has been

²¹ Union Trust Co. of N. Y. v. Chicago & Lake Huron R. R. Co., 7 Fed. R. 513. See Stanton v. Ala. & C. R. R. Co., 31 Fed. R. 585; s. c. 2 Woods, 506.

²² Central Nat. Bank v. Hazard, 30 Fed. R. 484; Central Trust Co. v. Sheffield & B. C. & I. Ry. Co., 44 Fed. R. 526.

²³ Bank of Montreal v. Thayer, 7 Fed. R. 622.

²⁴ Jerome v. McCarter, 94 U. S. 734.

²⁵ For a good form of an order and a certificate, see Kennedy v. St. Paul & P. R. R. Co., 2 Dill. 448.

²⁶ Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 298.

²⁷ Miltenberger v. Logansport, Ry. Co., 106 U. S. 286.

²⁸ Farmers' Loan & Trust Co. Petitioner, 129 U. S. 206.

§ 248. ¹ Frank v. Denver & R. G. Ry. Co., 23 Fed. R. 757; *Ex parte* Koehler, 23 Fed. R. 529; Missouri Pacific Ry. Co. v. Texas & Pacific Ry. Co., 31 Fed. R. 862.

² Missouri Pac. Ry. Co. v. Texas & P. Ry. Co., 31 Fed. R. 862.

said, that from the nature of things the court cannot determine how many trains a receiver shall run,³ or select his employees,⁴ although it may regulate his treatment of them.⁵ The court has, however, at a receiver's request, instructed him what rates to charge;⁶ and has directed him not to obey so much of a State statute as forbade a less charge for transport over that part of a railroad which competed with transportation by water, than over other parts of the same length, the traffic upon which was not affected by such competition, in a case where it was held that the charter of the corporation gave it a contract right to charge a reasonable rate, and that the statute was unconstitutional; where the petition for instructions was filed a month before the act went into operation.⁷ When a railroad was in the hands of a receiver appointed in a suit to foreclose a mortgage, the court refused to entertain a petition by the mortgagor asking instructions as to the propriety of postponing a meeting of its stockholders, and permission to postpone the meeting.⁸

§ 249. **Litigation by Receivers.**—The causes of action which a receiver can enforce are of two kinds,—those which belonged to the estate of which he has charge before it was entrusted to him, and those which have accrued since his appointment. As has been said before, he cannot sue upon either without the leave of the court which appointed him.¹ A suit upon a cause of action which belonged to the estate before his appointment is brought in the name of the legal owner of the estate;² unless, as is not uncommon, the order authorizes the receiver to sue in his own name.³ In the former case, the person whose name is used is indemnified out of the fund for all costs to which he is thereby made liable.⁴ Receivers of corporations are usually authorized to sue in the name of the corporation.⁵ Costs recov-

³ Brewer, J., Treat, J. concurring, in *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 23 Fed. R. 863, 867.

⁴ Brewer, J., in *Frank v. Denver & R. G. Ry. Co.*, 23 Fed. R. 757, 764.

⁵ *Frank v. Denver & R. G. Ry. Co.*, 23 Fed. R. 757, 764.

⁶ *Ex parte Koehler*, 23 Fed. R. 529.

⁷ *Ex parte Koehler*, 23 Fed. R. 529.

⁸ *Taylor v. Phila. & Reading R. R. Co.*, 7 Fed. R. 381.

§ 249. ¹ *Wynne v. Lord Newborough*, 1 Ves. Jr. 131; s. c. 3 Brown Chancery

Cases, 88; *Green v. Winter*, 1 J. Ch. (N. Y.) 60.

² *Dick v. Struthers*, 25 Fed. R. 103; *Dick v. Oil-Well Supply Co.*, 25 Fed. R. 105; *Daniell's Ch. Pr.* (2d Am. ed.) 1977, 1991.

³ *Davis v. Gray*, 16 Wall. 203. See *Frankle v. Jackson*, 30 Fed. R. 398.

⁴ *Daniell's Ch. Pr.* (2d Am. ed.) 1991.

⁵ *Frankle v. Jackson*, 30 Fed. R. 398; *Davis v. Gray*, 16 Wall. 203; *Harland v. Bankers' and Merchants' Tel. Co.*, 33 Fed. R. 199.

cred against a receiver in an action brought by him in his official capacity, are entitled upon the distribution of the fund to a priority over claims that existed against it before the receiver's appointment.⁶ In the conduct of litigation, as in every other proceeding by him, a receiver is under the constant supervision of the court.⁷ He is not bound by a stipulation which is not advantageous to the estate, made by himself or his counsel without the sanction of the court.⁸ He cannot waive a defense, whether technical or substantial.⁹ He cannot allow a set-off not authorized by law.¹⁰ He may be allowed to discontinue without costs an action honestly but erroneously begun by him.¹¹ The rights of a receiver are in general no greater than those of the person whose estate he holds.¹² Thus, a receiver of an insolvent corporation appointed in a creditor's suit cannot "enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent;"¹³ for example, a statutory liability of stockholders to creditors.¹⁴ It has, however, been said: "It is the settled doctrine that the receiver of an insolvent corporation represents not only the corporation but also creditors and stockholders, and that in his character as trustee for the latter, he may disaffirm and maintain an action as receiver to set aside illegal or fraudulent transfers of the property of the corporation made by its agents or officers, or to recover its funds or securities invested or misapplied."¹⁵ The defendant to an action by the receiver of an insolvent's estate cannot set off claims against the insolvent which have been assigned to him since the application for the

⁶ *Camp v. Receivers of the Niagara Bank*, 2 Paige (N. Y.), 283; *Columbian Ins. Co. v. Stevens*, 37 N. Y. 536; *Locke v. Covert*, 42 Hun (49 N. Y. S. C. R.), 484.

⁷ *Van Dyck v. McQuade*, 85 N. Y. 616; *McEvers v. Lawrence*, Hoff. Ch. (N. Y.) 175.

⁸ *Van Dyck v. McQuade*, 85 N. Y. 616.

⁹ *McEvers v. Lawrence*, Hoffman Ch. (N. Y.) 172; *Keiley v. Dusenbury*, 10 J. & S. (N. Y. Superior Ct.) 238; s. c. 77 N. Y. 597; *Van Dyck v. McQuade*, 85 N. Y. 616.

¹⁰ *Van Dyck v. McQuade*, 85 N. Y. 616.

¹¹ *St. John v. Denison*, 9 How. Pr. (N. Y.) 343; *Reeder v. Seely*, 4 Cowen,

548; *Arnoux v. Steinbrenner*, 1 Paige (N. Y.), 82.

¹² *Jacobson v. Allen*, 12 Fed. R. 454, 457. But see *Hart v. Barney & S. Manuf. Co.*, 7 Fed. R. 543.

¹³ *Wallace, J.*, in *Jacobson v. Allen*, 12 Fed. R. 454.

¹⁴ *Jacobson v. Allen*, 12 Fed. R. 454.

¹⁵ *Andrews, J.*, in *Attorney-General v. Guardian Mutual Life Ins. Co.*, 77 N. Y. 272, 275. See also *Gillet v. Moody*, 3 N. Y. 479, 488; *Talmage v. Pell*, 7 N. Y. 328; *Whittlesey v. Delaney*, 73 N. Y. 571; *National Trust Co. v. Miller*, 33 N. J. Eq. 155, 158; *Jacobson v. Allen*, 12 Fed. R. 454, 455.

receiver's appointment.¹⁶ A receiver has no absolute right to sue in the courts of a sovereignty foreign to that from which he holds his authority.¹⁷ He may sue in a foreign court upon a judgment which he has recovered in the court which appointed him.¹⁸ By comity he is usually allowed to sue in a foreign court,¹⁹ unless by so doing he would interfere with a preference given to domestic creditors by the laws or public policy of the State wherein he brings the action.²⁰ In this respect, it seems, that a court of the State within which a Federal court is held is considered as foreign to the latter, at least when sitting in bankruptcy.²¹ A substituted trustee can, however, sue in a foreign jurisdiction, even though, when the court appointed him, it required him to give a bond and to account to itself in the same manner as a receiver.²² It has been said, that "where property, in the possession of a third person, is claimed by the receiver, the complainant must make such person a party by amending the bill, or the receiver must proceed against him by suit in the ordinary way."²³ Otherwise, a receiver is especially favored in the enforcement of causes of action arising after his appointment. He can, upon motion or petition in the suit wherein he is appointed, obtain injunctions to prevent disobedience to contracts made with him,²⁴ or prevent interference with property in his possession,²⁵ whether the person enjoined is a party to the suit or not. In nearly every case interference with a receiver in the discharge of his duties is a contempt of court, even when no injunction expressly forbidding it has been issued.²⁶

¹⁶ *In re* Van Allen, 37 Barb. (N. Y.) 225, 231; *Van Dyck v. Quade*, 85 N. Y. 616.

¹⁷ *Booth v. Clark*, 17 How. 322; *Brigham v. Luddington*, 12 Blatchf. 237; *Olney v. Tanner*, 10 Fed. R. 101; *Hazard v. Durant*, 19 Fed. R. 471, 476; *Holmes v. Sherwood*, 16 Fed. R. 725; s. c. 3 McCrary, 405.

¹⁸ *Wilkinson v. Culver*, 25 Fed. R. 639.

¹⁹ *Ex parte Norwood*, 3 Biss. 504; *Hunt v. Jackson*, 5 Blatchf. 349; *Cuykendall v. Miles*, 10 Fed. R. 342; *Chambers v. M'Dougal*, 42 Fed. R. 694, 696; *Hurd v. Elizabeth*, 41 N. J. Law (12 Vroom), 1; *Bank v. McLeod*, 38 Ohio St. 174. But see *Booth v. Clark*, 17 How. 322; *Holmes v. Sherwood*, 16 Fed. R. 725.

²⁰ *Booth v. Clark*, 17 How. 322; *Brig-*

ham v. Luddington, 12 Blatchf. 237; *Olney v. Tanner*, 10 Fed. R. 101.

²¹ *Olney v. Tanner*, 10 Fed. R. 101. But see *Chambers v. M'Dougal*, 42 Fed. R. 694, 696.

²² *Glenn v. Soule*, 22 Fed. R. 417; *Holmes v. Sherwood*, 16 Fed. R. 725; s. c. 3 McCrary, 405.

²³ Mr. Justice Swayne in *Davis v. Gray*, 16 Wall. 203, 218; citing *Parker v. Browning*, 8 Paige (N. Y.), 388; *Noe v. Gibson*, 7 Paige (N. Y.), 513.

²⁴ *Walton v. Johnson*, 15 Simons, 352.

²⁵ *Angel v. Smith*, 9 Ves. 335; *Kerr on Receivers*, (2d American edition), 177-181.

²⁶ *Thompson v. Scott*, 4 Dill. 508; *Davis v. Gray*, 16 Wall. 203, 218.

For example, striking laborers have been adjudged guilty of contempt for attempting to prevent employes of a receiver of a railroad from working for him.²⁷ In one of these cases it was said: "If the testimony makes it clear that when these parties went in such numbers, and conducted themselves in such a way, that while they simply said, 'Please get off this engine,' or 'We want you to get off this engine,' they intended to overawe,—intended, by the demonstrations which they made, to impress upon the minds of the engineers and train-men that personal prudence compelled them to leave,—why, then the government has made out its case. As my brother Treat said in a similar case,²⁸ that we had before us in St. Louis, a request, under these circumstances, is a threat. Every sensible man knows what it means, and courts are bound to look at things just as they are, to pass upon facts just as they are developed, to treat the conduct of men just as it is, and to impute to them that intention which their acts and their conduct disclose was their intention."²⁹ And in another case the same judge said: "Now, if a party engaged in a lawful undertaking unintentionally interferes with some of the officers of this court, and obstructs them in the discharge of their duties, this court is not tenacious of any mere prerogative, and would let such action pass almost without notice; but where parties are engaged in that which is of itself unlawful, in doing that which they have no right to do, and in so doing obstruct the officers of the court although intending no contempt, that is a very different thing."³⁰

It has been held that in an action by the receiver of a national banking association against stockholders or debtors of the bank, the defendants cannot contest the validity of the appointment of the receiver.³¹

§ 250. **Duties of Receivers.**—A receiver holds the property of which he is given the care in trust for all persons interested therein, whether parties to the suit or not,¹ provided that they do not claim it by a title paramount to his own.² His duties,

²⁷ *Secor v. Toledo, P. & W. R. R. Co.*, 7 Biss. 513; *King v. Ohio & M. Ry. Co.*, 7 Biss. 529; *In re Doolittle*, 23 Fed. R. 544; *United States v. Kane*, 23 Fed. R. 748; *In re Higgins*, 27 F. R. 443.

²⁸ *In re Doolittle*, 23 Fed. R. 544, 548.

²⁹ *Brewer, J.*, in *United States v. Kane*, 23 Fed. R. 748, 751.

³⁰ *Brewer, J.*, *In re Doolittle*, 23 Fed. R. 544, 547.

³¹ *Young v. Wempe*, 46 Fed. R. 354.
§ 250. ¹ *Davis v. Gray*, 16 Wall. 203, 217, 218; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 23 Fed. R. 863.

² *Davis v. The Duke of Marlborough*, 2 Swanst. 108, 118, 137, 138; *Georgia*

therefore, are substantially those of a trustee, although his powers are usually more limited; and the decisions concerning the duties and liabilities of trustees, executors, administrators, and assignees in bankruptcy and insolvency are often of service in determining those of a receiver.³ A receiver's first duty after his appointment is to take possession of the property entrusted him by the order, using all the powers therein given him.⁴ If any of it is under lease he should notify the tenants of his appointment and demand that they attorn to him.⁵ It seems that as soon as he has obtained possession of all the estate that consists of personal property he should make an inventory thereof.⁶ "Under some circumstances a receiver would be derelict in duty, if he did not cause property in his hands to be insured against fire."⁷ All moneys that he receives he should either pay into court or deposit in a bank to the credit of himself as receiver, in a separate account from that for his private deposits.⁸ In remitting money from one place to another, he may do so by using the ordinary means, provided that he uses due care.⁹ He will be personally liable for all loss to the estate caused by his making any other disposition of the funds collected by him.¹⁰ It is advisable for a receiver to take a receipt for all sums of money exceeding twenty dollars paid out by him. By so doing, and by using such receipts as vouchers, he will have less difficulty in passing his accounts.¹¹ A receiver should so keep the estate in his hands that it can be easily traced, delivered up, or accounted for.¹² He should, at least as often as once a year, account and pay into court all the money which he has received, together with the profits thereof, less all necessary or author-

v. Atlantic & Gulf R. R. Co., 3 Woods, 434.

³ See, for example, *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278; *People v. National Trust Co.*, 82 N. Y. 283.

⁴ *Daniell's Ch. Pr.* (2d Am. ed.) 1987.

⁵ *Daniell's Ch. Pr.* (2d Am. ed.) 1987.

⁶ *Lewin on Trusts* (6th ed., London, 1875), 184; *England v. Downs*, 6 Beav. 269. See also *Williamson v. Wilson*, 1 Bland (Md.), 418, 436.

⁷ *Thompson v. Phoenix Insurance Co.*, 136 U. S. 287, 293, *per* Mr. Justice Harlan.

⁸ *Salway v. Salway*, 4 Russ. 60; s. c. 2 R. & M. 215; *Wren v. Kirton*, 11 Ves.

377; *Hinckley v. Railroad Co.*, 100 U. S. 153, 157.

⁹ *Knight v. Lord Plimouth*, 3 Atk. 480; s. c. 1 Dickens, 120.

¹⁰ *Salway v. Salway*, 4 Russ. 60; s. c. 2 R. & M. 215; *Rowth v. Howell*, 3 Ves. 565.

¹¹ *Remsen v. Remsen*, 2 J. Ch. (N. Y.) 495, 501.

¹² *Williamson v. Wilson*, 1 Bland (Md.), 18; *Hinckley v. Railroad Co.*, 100 U. S. 153, 157; *Attorney-General v. North American Life Ins. Co.*, 89 N. Y. 94, 107, 108.

ized expenditures, and such compensation as the court allows him.¹³ If he receives a considerable sum of money during the interval between the regular times for his accounting, it seems that he should apply to the court for directions concerning its investment;¹⁴ and in general, he should apply for instructions whenever any unexpected event occurs of which advantage may be taken for the benefit of the estate, or which necessitates active measures to preserve the estate from loss.¹⁵ Any profit which he may make from the estate belongs to the finally successful party, or to him to whom the surplus, after the payment of prior demands, is finally directed to be paid.¹⁶ And if he uses the property over which he has been appointed in his private business, he must pay to the estate for its use.¹⁷ It is usually considered improper for a receiver to retain as his counsel one who has previously acted in the suit for one of the parties.¹⁸ But it is proper for a receiver appointed in a suit brought by a creditor for the satisfaction of his own debt alone, to retain the attorney of the complainant.¹⁹ In one case, the court refused to allow the receiver to retain a relative who had previously practised elsewhere, and had come into the circuit apparently for the purpose of acting as counsel for the receiver.²⁰ A receiver of a railroad is a common carrier,²¹ and is guilty of impropriety, for which he may be removed, when he discriminates between different persons who use the railway.²² A receiver of a railway may be obliged to repay such sums of money as he has exacted from shippers of freight by unlawful discriminations against them.²³ A receiver cannot resign without the permission of the court which appointed him.²⁴ A recent statute provides "that whenever in any cause

¹³ Daniell's Ch. Pr. (2d Am. ed.) 1992; *Shaw v. Rhodes*, 2 Russ. 539. See § 256.

¹⁴ *Shaw v. Rhodes*, 2 Russ. 539; *Hicks v. Hicks*, 3 Atk. 274; *Earl of Lonsdale v. Church*, 3 Brown Ch. C. 41.

¹⁵ *Shaw v. Rhodes*, 2 Russ. 539; *Hicks v. Hicks*, 3 Atk. 274; *Earl of Lonsdale v. Church*, 3 Brown Ch. C. 41.

¹⁶ *Gibbs v. David*, L. R. 20 Eq. 373. But see *Whitesides v. Lafferty*, 3 Humph. (Tenn.) 150.

¹⁷ *Battaile v. Fisher*, 36 Miss. 321.

¹⁸ *Ryckman v. Parkins*, 5 Paige (N. Y.), 543; *Blair v. St. Louis, H. & K. R. R. Co.*, 20 Fed. R. 348.

¹⁹ *Shainwald v. Lewis*, 8 Fed. R. 878.

²⁰ *Blair v. St. Louis, H. & K. R. R. Co.*, 20 Fed. R. 348.

²¹ *Beers v. Wabash, St. L. & P. Ry. Co.*, 34 Fed. R. 244.

²² *Handy v. Cleveland & M. R. R. Co.*, 31 Fed. R. 689. See *Missouri Pac. Ry. Co. v. Texas & P. Ry. Co.*, 30 Fed. R. 2; *Cutting v. Florida Ry. & Nav. Co. (Mallory et al., Interveners)*, 43 Fed. R. 747.

²³ *Cutting v. Florida Ry. & Nav. Co. (Mallory et al. Interveners)*, 43 Fed. R. 747.

²⁴ Daniell's Ch. Pr. (2d Am. ed.) 2002. See *In the Matter of Jones*, 4 Sandford's Ch. (N. Y.) 615.

pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall on conviction thereof be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.”²⁵

§ 251. **Liability of a Receiver.** — The liabilities of a receiver are, in many respects, analogous to those of a trustee. He is liable to all persons interested in the estate in his hands for any damage resulting to them from any breach of duty by him, whether intentionally¹ or through negligence.² He is, however, free from liability to the parties to the suit on account of any act performed in obedience to an order of the court within its jurisdiction, and not obtained by fraud, until the same has been vacated upon appeal or otherwise.³ A receiver's liability to strangers is much more limited than that of a trustee.⁴ He is not liable personally upon a covenant entered into in his official capacity with the sanction of the court.⁵ A few cases seem, however, to imply that by retaining the possession for the use of the estate of property held under a lease, he would become personally liable for the rent, where he had made no agreement to retain possession of the premises under the authority of the court.⁶ A receiver, even when acting as a common carrier, is not liable personally for injuries caused by the negligence of his

²⁵ 25 St. at L. ch. 866, § 2, p. 436; 24 St. at L. ch. 373, § 2, p. 554.

§ 251. ¹ *Knight v. Lord* Plimouth, 3 Atk. 480, 481; *Kaiser v. Kellar*, 21 Iowa, 95, 97; *Koontz v. Northern Bank*, 16 Wall. 196, 202, 203.

² *Skerrett's Minors*, 2 Hog. 192.

³ *Holcombe v. Johnson*, 27 Minn. 353.

⁴ See *Taylor v. Davis*, 110 U. S. 330, 335.

⁵ *Livingston v. Pettigrew*, 7 Lansing (N. Y.), 405; *Newman v. Davenport*, 9 Baxter (Tenn.), 538; *Taylor v. Davis*, 110 U. S. 330, 335; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 Fed. R. 259.

⁶ *Commonwealth v. Franklin Ins. Co.*, 115 Mass. 278; *People v. National Trust Co.*, 82 N. Y. 283; *People v. Universal Life Ins. Co.*, 30 Hun (37 N. Y. S. C. R.), 142. But see *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 Fed. R. 259, 269; s. c. 46 Fed. R. 26; *Brown v. Toledo, P. & W. R. Co.*, 35 Fed. R. 444; *Easton v. Houston & T. C. Ry. Co.*, 38 Fed. R. 784; *Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co.*, 42 Fed. R. 6; s. c. 44 Fed. R. 653; *Kneeland v. American Loan & Trust Co.*, 136 U. S. 89; *supra*, § 243, p. 457, note 37.

employees, when he exercised reasonable care in their selection.⁷ The only remedy of the person thus aggrieved is by an action against the receiver in his official capacity, seeking satisfaction out of the estate.⁸ When the receiver has been discharged and the estate sold, or returned to its owner, he has no remedy except against the employee, unless one has been preserved for him by the court;⁹ for the owner of the property is not liable for the negligence of the receiver's employees.¹⁰ For this reason it is customary to insert in the order for the sale in bulk of property in the possession of a receiver, that the purchaser shall take it subject to all claims for injuries caused while it was managed by the receiver.¹¹ Such a provision, although not mentioned in the order for the sale, may be inserted as a condition in the order confirming the sale, and the purchaser, after taking possession under the latter order, is estopped from disputing the validity of the condition.¹² Such claims are usually enforced in the suit in which the receiver was appointed.¹³ By the former practice, following the old chancery rule, a receiver could not be sued without the permission of the court that appointed him.¹⁴ Such an order was revocable, and might have been conditional.¹⁵ "The leave to bring suit in any form reserves the right to the receiver to set up any defense he may have, which can be done by plea, answer, or demurrer."¹⁶ The court might direct that service of process be made upon the resident agent of a non-resident receiver.¹⁷ A recent statute changes the practice as follows: "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transac-

⁷ *Kennedy v. I. C. & L. R. Co.*, 3 Fed. R. 97; *Union Trust Co. v. Chicago & L. H. Ry. Co.*, 7 Fed. R. 513, 516; *Davis v. Duncan*, 19 Fed. R. 477; *Farmers' L. & Tr. Co. v. Central Railroad of Iowa*, 2 McCrary, 181; s. c. 7 Fed. R. 537. See, however, *Kain v. Smith*, 80 N. Y. 458.

⁸ *Kennedy v. I. C. & L. R. Co.*, 3 Fed. R. 97; *Farmers' L. & Tr. Co. v. Central R. R. of Iowa*, 2 McCrary, 181; s. c. 7 Fed. R. 537; *Union Trust Co. v. C. & L. H. Ry. Co.*, 7 Fed. R. 513, 516.

⁹ *Davis v. Duncan*, 19 Fed. R. 477; *White v. Keokuk & D. M. Ry. Co.*, 52 Iowa, 97.

¹⁰ *Davis v. Duncan*, 19 Fed. R. 477.

¹¹ *Farmers' L. & Tr. Co. v. Central R. R. of Iowa*, 2 McCrary, 181; s. c. 7 Fed. R. 537; s. c. subsequently considered, 17 Fed. R. 758.

¹² *Farmers' L. & Tr. Co. v. Central R. R. of Iowa*, 17 Fed. R. 758.

¹³ *Farmers' L. & Tr. Co. v. Central R. R. of Iowa*, 17 Fed. R. 758.

¹⁴ *Barton v. Barbour*, 104 U. S. 126.

¹⁵ *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 26 Fed. R. 74.

¹⁶ *Davis v. Duncan*, 19 Fed. R. 477, 483. See also *Jordan v. Wells*, 3 Woods, 527.

¹⁷ *Central Trust Co. v. St. Louis A. & T. Ry. Co.*, 40 Fed. R. 426.

tion of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.”¹⁸ In a recent case, Judge Caldwell thus construed this statute: “This court will not entertain the suggestion that its receiver will not obtain justice in the State courts. The act of Congress gives the right to sue the receiver in the State court. *Trust Co. v. Railway Co.*, 40 Fed. R. 426. The State court has jurisdiction of the parties and the subject-matter, and its judgment against the receiver of this court is as final and conclusive as it is against any other suitor. The right to sue the receiver in the State court would be of little utility, if its judgment could be annulled or modified at the discretion of this court. It is open to the receiver to correct the errors of the inferior courts of the State by an appeal to the Supreme Court. But this court is not invested with appellate or supervisory jurisdiction over the State courts, and cannot annul, vacate, or modify their judgments. *Randall v. Howard*, 2 Black. 585; *Nougue v. Clapp*, 101 U. S. 551. It is true the act of Congress provides that, when the receiver is sued, the ‘suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.’ This clause of the act establishes no new rule, but is merely declaratory of the previously existing law. The receiver holds the property for the benefit of all persons having any interest in or lien upon it. The road is a unit. Broken into parts, or deprived of its rolling stock, its value would be greatly impaired. Suits, therefore, which seek to deprive the receiver of the possession of the property, and all process the execution of which would have that effect, are subject to the control of the court appointing the receiver, so far as may be necessary to the ends of justice. The marshalling of the assets, and the orderly distribution of the fund or property according to the rights and equities of the several parties in interest, is not to be interfered with by the judgment or process of the State court. The

¹⁸ 25 St. at L. ch. 866, § 3, p. 436; 24 St. at L. ch. 373, § 3, p. 554. See *Croy v. Marshall*, 21 Ohio Weekly Law Bulletin, 489; *Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co.* (Sullivan Intervenor), 41 Fed. R. 310, 314.

judgment of the State court is conclusive as to the amount of the debt, but the time and mode of its payment must be controlled by the court appointing the receiver. The receiver should have the right to appeal from the judgments of the State courts. Appeals should not be taken for delay, but that justice may be done. When the receiver, in good faith, takes an appeal, he should not be required by this court to execute a *supersedeas* bond. The receiver is an officer of the court. His possession of the property is the possession of the court. The property of the railroad stands as security for all the obligations of the court incurred in its operation. The receiver, no more than the judge of the court, should be required to become personally bound as a condition of his appealing, in good faith, from the judgment of a State court rendered against him in his official capacity. The court will not part with the possession of the property until the obligations incurred by the receiver are paid, or proper provision is made to secure their payment. *Dow v. Railroad Co.*, 20 Fed. R. 265, 269. The objection of plaintiff's counsel to the clause of the order, as originally drawn, which required the receiver to execute *supersedeas* bonds in cases which he appealed, is sustained, and that clause will be stricken out."¹⁹ In another recent case Judge Hammond said, when charging a jury: "This is what we call an 'issue out of chancery,' and comes to us from the equity side of this court, in pursuance of a practice that submits to a jury in a court of law questions of fact that ordinarily, and but for the fact that the equity court is proceeding to exercise its jurisdiction in the premises, would be cognizable in a court of law. It has always been my judgment that a jury should pass upon such questions as these, and, while it must be conceded that the court of equity has the power, without a violation of the constitutional right of trial by jury, to try them in its own way, by the chancellor, or through a reference to a master, yet it is the practice of those courts to submit, upon application of the parties, those questions of fact peculiarly cognizable in a court of law to that court for trial; and this out of deference to the sensibilities of our race of people against the impairment of their cherished institution of trial by jury, which in these States we sought to preserve by constitutional provisions, none of which are so sedulous to preserve it as the Federal constitution itself. Courts of equity

¹⁹ *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, 41 Fed. R. 551, 555-556.

accomplish their purpose of yielding to the parties this preference for a trial by jury, either by permitting them, in proper cases, to proceed against their receivers by a regular suit at law, or by the method adopted in this case, of sending to the court of law issues of fact to be tried by the jury; and, it having seemed to this court, sitting in equity in this case, that recent legislation by Congress is a manifestation of its legislative will that this preference for trial by jury shall be acknowledged and favored by the courts of equity, if not a rebuke to them for the practice of denying it in the exercise of their power to refer them to a master in equity, these issues have been certified to us for trial.”²⁰ In a later case, Judge Pardee said: “The third section of the act of 1887, quoted above, in terms provides that the suit so instituted in another court shall be subject to the general equity jurisdiction of the court in which the receiver is appointed, so far as the same shall be necessary to the ends of justice. The better opinion of the effect of said section is that it merely dispenses with leave of the court appointing the receiver, as a prerequisite to instituting a suit against him in another court, and that a suit brought thereunder has the same *status*, and a judgment rendered therein has the same effect, as if permission to sue had been regularly granted by the court appointing the receiver. However this may be, it is clear that when a judgment is so obtained, and is brought to the court of original jurisdiction to be ranked as a lien upon the trust funds, such judgment is subject to the general equity jurisdiction, and the duty of determining the rightfulness of the judgment, including whether the amount is just, is still imposed upon this court, as it would be if it had ordered an issue tried at law; for this court must still, in the language of the statute, exercise a ‘general equity jurisdiction, so far as the same shall be necessary to the ends of justice.’ In the present case, the proceedings before the master show that intervenor offered evidence, in addition to that contained in the record from the State court, tending to show the fact of injury, and the extent of damages, thereby waiving any right intervenor may have had to claim that his judgment was conclusive upon the question of negligence and damages. For these reasons, I am of the opinion that in the present intervention the court may inquire as to whether or not the intervenor has a lien, and, if so, the rank and amount thereof,

²⁰ *Atkin v. Wabash Ry. Company*, 41 Fed. R. 193, 194.

and that in such inquiry the court is not concluded in any way by the verdict and judgment produced from the district court of Harrison County, Tex.”²¹ The latest decision on this statute was by the Supreme Court of the United States, as follows: “It was not intended by the word ‘his’ to limit the right to sue to cases where the cause of action arose from the conduct of the receiver himself or his agents, but that with respect to the question of liability, he stands in place of the corporation. His position is somewhat analogous to that of a corporation sole, with respect to which it is held by the authorities that actions will lie, by and against the actual incumbents of such corporations, for causes of action accruing under their predecessors in office.”²² Accordingly, it was held that the act applied to suits against a receiver for liabilities incurred by his predecessor in office.²² A judgment in a suit thus prosecuted can only be collected out of the property in the hands of the receiver in his official capacity.²³ A receiver is personally liable to strangers for trespass,²⁴ fraud,²⁵ or other wilful act, although performed under color of his office. So, if he by mistake, though honestly, takes possession of the property of another, he is personally liable.²⁶ The fact that he does so under authority of an order of the court will not justify him as against a person who was not a party to the suit or proceeding in which the order was granted.²⁷ In all of such cases it seems that he can, independently of the statute, be sued without leave of the court which appointed him.²⁸ But when a receiver of a State court was sued in a Federal court for an infringement of a patent, in obedience to an order of the State court the Federal court stayed its proceedings, to allow time for an application to the State court to modify its order.²⁹ A person who, without having been lawfully appointed, assumes to act as a receiver, has all the

²¹ *Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co.*, Sullivan intervenor, 41 Fed. R. 311, 314, *per* Pardee, J.

²² *McNulta v. Lochridge*, 12 S. C. Rep. 11; 142 U. S. 1, *per* Mr. Justice Brown.

²³ *Farmers' L. & Tr. Co. v. Central R. R. of Iowa*, 2 McCrary, 181; s. c. 7 Fed. R. 537; *Barton v. Barbour*, 104 U. S. 126; *Missouri Pac. Ry. Co. v. Texas Pac. Ry. Co.* (Sullivan intervenor), 41 Fed. R. 310.

²⁴ *In re Young*, 7 Fed. R. 855; *Olney v. Tanner*, 10 Fed. R. 101; *Barton v. Barbour*, 104 U. S. 126, 134.

²⁵ *Bank of Montreal v. Thayer*, 7 Fed. R. 622.

²⁶ *Barton v. Barbour*, 104 U. S. 126, 134; *Curran v. Craig*, 22 Fed. R. 101.

²⁷ *Curran v. Craig*, 22 Fed. R. 101.

²⁸ *Barton v. Barbour*, 104 U. S. 126, 134; *In re Young*, 7 Fed. R. 855; *Bank of Montreal v. Thayer*, 7 Fed. R. 622; *Curran v. Craig*, 22 Fed. R. 101. But see *Aston v. Heron*, 2 Myl. & K. 390; *Chalie v. Pickering*, 1 Keen, 749.

²⁹ *Curran v. Craig*, 22 Fed. R. 101.

liabilities of one duly appointed.³⁰ Where a statute imposed a penalty for a failure to alter a railroad bridge after notice by the Secretary of War, and such notice had been served upon a railway company over which a receiver was subsequently appointed, but no notice was served upon the receiver, it was held that neither the railway company nor the receiver was liable to the penalty, — the proper remedy having been for the Secretary of War to bring to the attention of the court the facts, and request the court to order an alteration of the bridge out of the funds in the receiver's hands.³¹ It has been held that an action will not lie against a receiver for a personal injury sustained before his appointment.³² The discharge of a receiver until revoked relieves him from all liability to those who had an opportunity to be heard upon the motion for his discharge.³³

§ 252. **Manner of applying for the Appointment of a Receiver.** — It has been said that a court has no jurisdiction to appoint a receiver, unless a cause is pending;¹ and that, therefore, one will never be appointed upon petition² when no suit has been begun, except in the case of lunatics.³ The grounds of the exception and the reasons why it does not extend to infants⁴ are not very clear. After a suit has been begun, however, a receiver may be appointed at any stage of it when a necessity is shown, — before appearance,⁵ between appearance and answer,⁶ between answer and decree,⁷ at the decree,⁸ or afterwards, if the cause is still open.⁹ But a case of pressing necessity must exist to justify the appointment of a receiver before answer.¹⁰ An objection to the bill on account of multifariousness or a misjoinder of parties will not prevent the appointment of a receiver; nor will the pendency of

³⁰ *Wood v. Wood*, 4 Russ. 558.

³¹ *United States v. St. Louis, A. & T. R. Co.*, 43 Fed. R. 414.

³² *Finance Co. of Pa. v. Charleston C. & C. R. Co.*, 46 Fed. R. 508.

³³ *Lehman v. McQuown*, 31 Fed. R. 138; *Davis v. Duncan*, 19 Fed. R. 477.

§ 252. ¹ *Anon.*, 1 Atk. 578. See § 260.

² *Anon.*, 1 Atk. 578; *Ex parte Whitfield*, 2 Atk. 315. *Merchants' & M. National Bank v. Kent Circuit Judge*, 43 Mich. 292.

³ *Ex parte Radcliffe*, 1 J. & W. 639; *Anon.*, 1 Atk. 578; *Ex parte Warren*, 10 Ves. 622.

⁴ *Ex parte Whitfield*, 2 Atk. 315.

⁵ *Tanfield v. Irvine*, 2 Russ. 149.

⁶ *Vann v. Barnett*, 2 Brown Ch. C. 158; *Metcalfe v. Pulvertoft*, 1 V. & B. 180.

⁷ *Kershaw v. Mathews*, 1 Russ. 361.

⁸ *Osborne v. Harvey*, 1 Y. & C. N. R. 116.

⁹ *Cooke v. Gwyn*, 3 Atk. 689. *Attorney-General v. Mayor of Galway*, 1 Molloy, 95; *Bowman v. Bell*, 14 Simons, 392.

¹⁰ *Latham v. Chafee*, 7 Fed. R. 525. See *Union Mut. Life Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. R. 287.

a motion for leave to amend the bill,¹¹ unless indeed the proposed amendment would change materially the allegations showing the necessity for a receiver. The bill should lay the foundation for the appointment by stating the facts which show its necessity and propriety,¹² and should contain a prayer for a receiver.¹³ If, however, a state of facts subsequently arise making the appointment necessary, it may probably be made without an amendment of the original or the filing of a supplemental bill.¹⁴ The application for a receiver should be supported by evidence showing that the appointment is necessary.¹⁵ If the application is made before decree, the affidavits should be founded upon the allegations in the bill.¹⁶ If statements not founded on allegations in the bill and alleging facts which existed and were known before the bill was filed, are introduced into the affidavits, it seems that the court will not consider them;¹⁷ and even if, where the case made by the bill fails, sufficient ground for a receiver is confessed in the answer, it seems that a receiver would be denied the plaintiff, at least until he had amended his bill.¹⁸ After an application for a receiver has been once denied, a second application supported by the same papers will rarely be granted.¹⁹ The former rule was that, after answer, a plaintiff when moving for a receiver could only rely upon the admissions in the answer;²⁰ but now a sworn answer is given upon such a motion little more effect than an ordinary affidavit, and may be contradicted by affidavits in support of the bill.²¹ The appointment is usually only made upon notice, and is very rarely granted *ex parte*.²² Less than one day's notice has been held to be insufficient.²³ A receiver may,

¹¹ *Barnard v. Darling*, 1 Barb. Ch. (N. Y.) 76.

¹² *Tomlinson v. Ward*, 2 Conn. 396; *Verplanck v. Mercantile Ins. Co.*, 2 Paige (N. Y.), 438. But see *Hottenstein v. Conrad*, 9 Kan. 435.

¹³ Rule 21. But see *Osborne v. Harvey*, 1 Y. & C. N. R. 116.

¹⁴ *Malcolm v. Montgomery*, 2 Molloy, 500; *Hottenstein v. Conrad*, 9 Kan. 435.

¹⁵ *Middleton v. Dodswell*, 13 Ves. 266; *Kerr on Receivers* (2d Am. ed.), 154.

¹⁶ *Dawson v. Yates*, 1 Beav. 301, 306; *Cremen v. Hawkes*, 2 Jones & LaT. 674; *Kerr on Receivers* (2d Am. ed.), 154.

¹⁷ *Dawson v. Yates*, 1 Beav. 301, 306; *Kerr on Receivers* (2d Am. ed.), 154.

¹⁸ *Cremen v. Hawkes*, 2 Jones & LaT. 674; *Kerr on Receivers* (2d Am. ed.), 154.

¹⁹ *Fenton v. Lumberman's Bank*, Clarke Ch. (N. Y.) 360.

²⁰ *Daniell's Ch. Pr* (2d Am. ed.) 1973. See *Goodman v. Whitcomb*, 1 J. & W. 589; *Kershaw v. Mathews*, 1 Russ. 361.

²¹ *Allen v. The Dallas & Wichita R. R. Co.*, 3 Woods, 316, 332.

²² *Blondheim v. Moore*, 11 Md. 365; *People v. Norton*, 1 Paige (N. Y.), 17; *Sandford v. Sinclair*, 8 Paige (N. Y.), 373; *Miltensberger v. Logansport Ry. Co.*, 106 U. S. 286.

²³ *St. Louis, K. C. & C. Ry. Co., v. Dewees*, 23 Fed. R. 691.

however, be appointed *ex parte*, if that is the only way to preserve the property from destruction or serious injury, or removal beyond the jurisdiction of the court.²⁴ It has been said that a receiver of the assets of a railroad company will rarely be appointed in a suit to which no stockholders or bondholders are actually parties.²⁵ Where the officer of a corporation who had been served with notice of a motion for the appointment of a receiver fraudulently concealed that fact from his associates, and did not oppose the motion, although no collusion with the plaintiff was shown, a motion to vacate the appointment was entertained.²⁶ A delay of one month after knowledge of the appointment of a receiver, who had expended in the improvement of the property money furnished him by others, was held such acquiescence as to estop a party from moving to vacate the order of appointment for irregularity because granted without notice to him.²⁷ Except in an extraordinary case, a receiver will not be appointed over property in the possession of a stranger to the suit.²⁸

§ 253. **Who may apply for the Appointment of a Receiver.**— A receiver is usually appointed upon the application of the plaintiff. Before a decree it seems that one defendant cannot move for a receiver,¹ unless he has filed a cross-bill praying for one.² After a decree, however, he may, in a proper case, obtain a receiver of the property of a co-defendant upon petition,³ but not usually over the property of the plaintiff without a cross-bill.⁴

§ 254. **Manner of the Appointment of a Receiver.**— By the English practice, which was followed in New York before the passage of statutes altering it, when an application for the appointment of a receiver was granted, the selection of the receiver was re-

²⁴ *Gibson v. Martin*, 8 Paige (N. Y.), 481; *Johns v. Johns*, 23 Ga. 31; *Triebert v. Burgess*, 11 Md. 452; *Gibbons v. Mainwaring*, 9 Simons, 77; *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286.

²⁵ *Overton v. Memphis & L. R. R. Co.*, 10 Fed. R. 866. But see *Central Trust Co. v. Texas & St. L. Ry. Co.*, 24 Fed. R. 153.

²⁶ *Allen v. The Dallas & Wichita R. R. Co.*, 3 Woods, 316.

²⁷ *Allen v. The Dallas & Wichita R. R. Co.*, 3 Woods, 316.

²⁸ *Searles v. The Jacksonville, Pensacola, & Mobile R. R. Co.*, 2 Woods, 621. See also *Davis v. Gray*, 16 Wall. 203, 218.

§ 253. ¹ *Robinson v. Hadley*, 11 Beav. 614; *Leddel's Ex'r v. Starr*, 19 N. J. Eq. (4 C. E. Green) 159. But see *Sargant v. Read*, L. R. 1 Ch. D. 600; *Henshaw v. Wells*, 9 Humph. (Tenn.) 568.

² *Grote v. Bury*, 1 W. R. 92; *Robinson v. Hadley*, 11 Beav. 614; *Kerr on Receivers* (2d Am. ed.), 153, 154.

³ *Barlow v. Gains*, 8 Beav. 329; *Hiles v. Moore*, 15 Beav. 175; *Kerr on Receivers* (2d Am. ed.), 154.

⁴ *Grote v. Bury*, 1 W. R. 92; *Robinson v. Hadley*, 11 Beav. 614; *Kerr on Receivers* (2d Am. ed.), 153, 154.

ferred to a master in chancery, whose action was subject to the confirmation of the court.¹ The same master usually exercised supervision over contracts made by the receiver and the adjustment of his compensation.² In the Federal courts, however, it is the customary practice for the judge to appoint and often to supervise a receiver himself, without the aid of a master, except when the accounts are passed.³

§ 255. **Who should be appointed Receiver.**—As a general rule no one should be appointed receiver of property who has any interest therein,¹ or is in any way connected with the litigation in the course of which the appointment is made,² or is nearly related to,³ or is in the employ of any of the parties thereto,⁴ or who, if he should receive the appointment, would occupy two inconsistent positions;⁵ nor a person who is not familiar with the management of similar property,⁶ and able to give sufficient attention to the management of his trust.⁷ Thus a stockholder,⁸ officer, or director⁹ of a corporation will very rarely be appointed a receiver of its assets; nor a party,¹⁰ or solicitor,¹¹ or the son or brother of a party¹² to a cause, over property which is the subject of the litigation. Nor should the next friend of an infant, whose duty it is to protect his interest, be appointed receiver

§ 254. ¹ *Creuze v. Bishop of London*, Dickens, 687; *Thomas v. Dawkin*, 1 Ves. Jr. 452; *In re Eagle Iron Works*, 8 Paige (N. Y.), 385; High on Receivers, § 90; *Danell's Ch. Pr.* (2d Am. ed.) 1976.

² *Thornhill v. Thornhill*, 14 Simons, 600.

³ *Miltenberger v. Logansport Ry. Co.*, 106 U. S. 286; *Buck v. Piedmont & Arlington Life Ins. Co.*, 4 Fed. R. 849; *Frank v. Denver & R. G. Ry. Co.*, 23 Fed. R. 757. But see *Taylor v. Phila. & Reading R. R. Co.*, 7 Fed. R. 379; s. c. 9 Fed. R. 1; *Cowdrey v. Railroad Co.*, 1 Woods, 331, 341.

§ 255. ¹ *Wiswell v. Starr*, 48 Me. 401.

² *Baker v. Backus*, 32 Ill. 79; *Garland v. Garland*, 2 Ves. Jr. 137.

³ *Williamson v. Wilson*, 1 Bland (Md.), 418.

⁴ *Baker v. Backus*, 32 Ill. 79; *Attorney-General v. Bank of Columbia*, 1 Paige (N. Y.), 511; *Buck v. Piedmont & Arlington Life Ins. Co.*, 4 Fed. R. 849.

⁵ *Stone v. Wishart*, 2 Madd. 64; *Ex parte Fletcher*, 6 Ves. 427.

⁶ *Lupton v. Stephenson*, 11 Ir. Eq. 484.

⁷ *Wynne v. Lord Newborough*, 15 Ves. 283; *Gibbs v. David*, L. R. 20 Eq. 373.

⁸ *Wiswell v. Starr*, 48 Me. 401; *Atkins v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. R. 161.

⁹ *Attorney-General v. Bank of Columbia*, 1 Paige (N. Y.), 511; *Buck v. Piedmont & Arlington Life Ins. Co.*, 4 Fed. R. 849; *Atkins v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. R. 161; *Baker v. Backus*, 32 Ill. 79; *Finance Co. of Pa. v. Charleston C. & S. C. R. Co.*, 45 Fed. R. 436.

¹⁰ *Wilson v. Greenwood*, 1 Swanst. 471; *Finance Co. of Pa. v. Charleston C. & S. C. R. Co.*, 45 Fed. R. 436.

¹¹ *Baker v. Backus*, 32 Ill. 79; *Garland v. Garland*, 2 Ves. Jr. 137; *Finance Co. of Pa. v. Charleston C. & S. C. R. Co.*, 45 Fed. R. 436.

¹² *Williamson v. Wilson*, 1 Bland (Md.), 418; *Taylor v. Oldham, Jac.* 527. But see *Shainwald v. Lewis*, 8 Fed. R. 878.

over his estate;¹³ nor an active trustee over the trust estate,¹⁴ although a mere dry trustee may be thus appointed.¹⁵ Nor should a master in chancery, whose duty it is to pass receivers' accounts, be appointed a receiver;¹⁶ nor should a solicitor who does not understand the management of machinery be appointed receiver over a manufacturing establishment.¹⁷ Nor should a person be appointed receiver who lives at a great distance from the estate over which a receiver is desired, and is actively engaged in another employment.¹⁸ It has also been said in England, "that the receiver-general of taxes for a county cannot be appointed a receiver; for having given, as such, security to the crown, if he were to become indebted to the crown and to the estate, the crown might, by its prerogative process, sweep away all his property."¹⁹ And Lord Eldon held that a peer could not be a receiver, because, "in many instances, a receiver may be committed."²⁰ The court may, however, under very special circumstances appoint as receiver a trustee,²¹ or a person interested in the subject of the suit,²² or even a party to the suit,²³ or his near relation.²⁴ This, however, will rarely be done unless by consent, or possibly when it clearly appears to be for the interest of all concerned;²⁵ and in such a case the receiver is usually obliged to act without compensation if he accepts the trust.²⁶ When a party to the cause is appointed receiver in it, he does not thereby lose his privilege of acting as party.²⁷ It has been held in Tennessee, that no one, not even a clerk of the court, can be made

¹³ *Stone v. Wishart*, 2 Madd. 64.

¹⁴ *Sutton v. Jones*, 15 Ves. 584; — *v. Jolland*, 8 Ves. 72.

¹⁵ *Sutton v. Jones*, 15 Ves. 584.

¹⁶ *Ex parte Fletcher*, 6 Ves. 427.

¹⁷ *Lupton v. Stephenson*, 11 Ir. Eq. 484.

¹⁸ *Wynne v. Lord Newborough*, 15 Ves. 283.

¹⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 1973. See *Attorney-General v. Day*, 2 Madd. 246, 254.

²⁰ *Attorney-General v. Gee*, 2 V. & B. 208.

²¹ *Sykes v. Hastings*, 11 Ves. 363; *Sutton v. Jones*, 15 Ves. 584; *Gardner v. Blane*, 1 Hare, 381; *Powys v. Blagrave*, 18 Jur. 463; *Ames v. Birkenhead Docks*, 29 Beav. 332; *Potts v. Warwick & Birmingham Canal Nav. Co.*, Kay, 113;

Kerr on Receivers (2d Am. ed.), 136-139.

²² *Hoffman v. Duncan*, 18 Jur. 69; *Powys v. Blagrave*, 18 Jur. 462; *Kerr on Receivers* (2d Am. ed.), 136.

²³ *Wilson v. Greenwood*, 1 Swanst. 471; *Blakeney v. Dufaur*, 15 Beav. 40; *Robinson v. Taylor*, 42 Fed. R. 803, 812.

²⁴ *Shainwald v. Lewis*, 8 Fed. R. 878.

²⁵ *Atkins v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. R. 161; *Kerr on Receivers* (2d Am. ed.), 136-139.

²⁶ *Wilson v. Greenwood*, 1 Swanst. 471, 483; *Blakeney v. Dufaur*, 15 Beav. 40; *Hoffmann v. Duncan*, 18 Jur. 69; *Powys v. Blagrave*, 18 Jur. 463. But see *Newport v. Bury*, 23 Beav. 30.

²⁷ *Scott v. Platel*, 2 Phil. 229; *Cowdrey v. Railroad Co.*, 1 Woods, 331, 370.

a receiver against his will.²⁸ It was held improper to appoint as assignee in bankruptcy of a corporation one who had been appointed by a State court receiver of its assets;²⁹ but it was subsequently held eminently proper to appoint as receiver of the assets of an insolvent corporation one who by the laws of the State that chartered it was the official custodian of its assets in case of its insolvency, even though that State was in another circuit from the one in which the suit for a receiver was brought, and the officer did not reside within the jurisdiction of the court.³⁰ In this case, it was made a condition of the appointment that the receiver should pay into the registry of the court the proceeds of all assets collected within its jurisdiction;³¹ but he was allowed to give sureties who were residents of the State where he dwelt.³² An order may provide for the appointment of a receiver in the alternative to other relief.³³ Recent statutes provide that no clerk or deputy clerk of a Federal court shall be appointed receiver except for special reasons which must be assigned in the order of appointment;³⁴ and that "no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member."³⁵

§ 256. *The Receiver's Security.*—As a general rule, the order for the appointment of a receiver provides that he shall give good and sufficient security for the faithful performance of his duties.¹ This, by the English practice, was usually a recognizance entered into by the receiver and two or more sureties, whereby they, the cognizers, acknowledged "themselves to be indebted to the cognizees (usually the Master of the Rolls and the senior Master of the Court) in certain sums of money to be paid on certain days therein mentioned; in default of which they will and agree that the said sums shall be levied and recovered of them, their heirs,

²⁸ *Waters v. Carroll*, 9 Yerg. (Tenn.) 102.

²⁹ *In re Stuyvesant Bank*, 5 Benedict, 506; s. c. 6 N. B. R. 272.

³⁰ *Taylor v. Life Association of America*, 3 Fed. R. 465.

³¹ *Taylor v. Life Association of America*, 3 Fed. R. 465.

³² *Taylor v. Life Association of America*, 3 Fed. R. 465.

³³ *Curling v. Townshend*, 19 Ves. 628.

³⁴ 20 St. at L. ch. 183, p. 415.

³⁵ 25 St. at L. ch. 373, § 7, p. 554.

§ 256. ¹ *Daniell's Ch. P.* (2d Am. ed.) 1977; *Mead v. Lord Orrery*, 3 Atk. 235; *Tomlinson v. Ward*, 2 Conn. 396.

executors, and administrators, and of all and singular their lands and hereditaments, goods and chattels.”² The recognizance, however, was subject to a condition making it void if the receiver should duly account for the rents and profits of the estate over which he was appointed.³ In the Federal courts no fixed rule prevails, the security required from a receiver being whatever the judge who orders his appointment thinks proper.⁴ When a receiver is appointed by consent, the court may appoint him without requiring security, or upon his own recognizance only.⁵ The sureties must usually dwell within the jurisdiction of the court; but under peculiar circumstances sureties residing elsewhere have been accepted.⁶ The sureties of a receiver cannot be discharged at their own request,⁷ except under special circumstances, “as where underhand practice is proved, and the person secured shown to be connected with such practice.”⁸ “For if people voluntarily make themselves bail or sureties for another, they know the terms, and will be held very hard to their recognizance, and not discharged at their request to have new sureties appointed, for then there would be no end of it.”⁹ If a surety should procure his discharge during the continuance of the receivership, the receiver must enter into a fresh recognizance.¹⁰ In law, a surety is liable to the full amount of the penalty of the recognizance, bond, or undertaking by which he is bound.¹¹ In equity, however, he is only liable to the full amount, including interest as well as principal, which the receiver is liable in equity to pay,¹² unless that exceeds the amount of the penalty, which fixes the extreme limit of his liability.¹³ It has been held in England that a surety who has undertaken to be responsible for whatever a receiver “should receive or become liable to pay” as such receiver, is liable for funds received by the receiver before the security was given.¹⁴ Where the parties interested have been guilty of

² Daniell's Ch. P. (2d Am. ed.) 1977; *Mead v. Lord Orrery*, 3 Atk. 235; *Tomlinson v. Ward*, 2 Conn. 396.

³ Daniell's Ch. P. (2d Am. ed.) 1999.

⁴ *Taylor v. Life Association of America*, 3 Fed. R. 465.

⁵ *Hibbert v. Hibbert*, 3 Meriv. 681; *Countess of Carlisle v. Lord Berkley*, Amb. 509; *Ridout v. Earl of Plymouth*, 1 Dickens, 68.

⁶ *Taylor v. Life Association of America*, 3 Fed. R. 465.

⁷ *Griffith v. Griffith*, 2 Ves. Sen. 400; *Gordon v. Calvert*, 2 Simons, 253.

⁸ *Hamilton v. Brewster*, 2 Molloy, 407.

⁹ Lord Hardwicke in *Griffith v. Griffith*, 2 Ves. Sen. 400.

¹⁰ *Vaughan v. Vaughan*, 1 Dickens, 90; *Blois v. Betts*, 1 Dickens, 336.

¹¹ *Dawson v. Raynes*, 2 Russ. 466, 468.

¹² *Dawson v. Raynes*, 2 Russ. 466.

¹³ *Walker v. Wild*, 1 Madd. 528.

¹⁴ *Smart v. Flood*, 49 L. T. 467.

gross delay in compelling the receiver to pass his accounts, the court may excuse the surety from the payment of the whole or a part of the interest.¹⁵ According to Daniell, "When an action is brought against a receiver's surety upon the recognizance, the proper course for him to pursue appears to be to apply to the court by motion to stay the proceedings on the recognizance, offering at the same time to pay the amount due from the receiver, so as the same does not exceed the amount of the recognizance, into court; and upon such motion, the order will be made, upon the surety's paying the cost of the application, and of the proceedings consequent upon it. When the receiver's account has not been taken, the motion should also pray a reference to the master to see what is due from the receiver; and it seems that upon such application the court will indulge the surety by allowing him to pay the balance by instalments."¹⁶ When a surety has been obliged to pay anything on account of the receiver, he will be entitled to a lien for his reimbursement upon anything which may subsequently be due to the receiver from the suit.¹⁷

§ 257. **Receivers' Accounts.** — A receiver should account annually to the court unless accounts at shorter intervals are required of him.¹ His accounts are filed and passed in the office of the master to whom matters pertaining to the receivership are referred.² A receiver's account should describe the situation of the estate at the time when he received it, and any changes that have since taken place. He should then state his receipts and disbursements, which should be set forth in schedules as specifically as possible.³ He should also state such indebtedness as he has incurred; and, in general, give as full a description of the estate in his hands, and of his actions concerning the same as is practicable.⁴ If a person has not been paid for services rendered to the estate, but has agreed with the receiver to be

¹⁵ Dawson v. Raynes, 2 Russ. 466.

¹⁶ Daniell's Ch. Pr. (2d Am. ed.) 2005, 2006, citing Walker v. Wild, 1 Madd. 528.

¹⁷ Glossop v. Harrison, Cooper, 61; s. c. 3 V. & B. 134.

§ 257. ¹ Potts v. Leighton, 15 Ves. 273; General Order, 15 Ves. 278; Lowe v. Lowe, 1 Tenn. Ch. 515.

² Daniell's Ch. Pr. (2d Am. ed.) 1996, 1997.

³ Daniell's Ch. Pr. (2d Am. ed.) 1996, 1997. But see Lafayette Co. v. Neely, 21 Fed. R. 738.

⁴ Daniell's Ch. Pr. (2d Am. ed.) 1996, 1997; Hooper v. Winston, 24 Ill. 353; Hinckley v. Railroad Co., 100 U. S. 153; Attorney-General v. North America Life Ins. Co., 89 N. Y. 94, 107; Bourne v. Maybin, 3 Woods, 724, 741; Equity Rule 79.

content with what the court allows him, that fact should be stated in the account together with a description of the services thus performed.⁵ Allowances for counsel fees will usually be small, until the final accounting of the receiver, when the full amount earned will be ordered paid.⁶ Such allowances are the property of the receiver, not of his counsel.⁷ In a recent case, upon an application for the payment of counsel fees pending a receivership, Judge Brewer said: "It is not because we think the counsel have not earned the amount reported by the master in their favor that we do not sustain this report in full; but we do not believe in the policy or propriety, pending a receivership, of making a large allowance to parties who are employed as officers of the court, or in looking after the interests of their clients in that connection. They should wait until the matter comes to a close, and then their bills, as a whole, should be presented. The court can then look at them, and pass upon the question as to whether they are correct or not. It makes a great difference, practically, in the administration of affairs, whether parties present bills for two or three thousand dollars every three or four months, or at the end of the litigation for eight or ten thousand dollars. We do not mean that counsel shall go without compensation as the case progresses, because they cannot afford to, but still these intermediate allowances will always be small, and will not be in the way of a determination of what the services up to that time are really worth, or what they should be at the final disposition of the case. They will be simply in view of the necessities, so to speak, of counsel pending litigation; and while the master in this case recommends an allowance of \$6,000, the order will be that these gentlemen be paid \$2,000 on account. The matter will then stand over until we come to the final disposition of the *Wabash case*, and then all fees and claims will be presented, and it will be seen whether there are funds enough in the *Wabash road* to pay expenses."⁸ Where before his appointment a receiver had received rent paid to him in his individual capacity in advance, he was obliged to apportion the rent, and to account for so much of it as was paid for the time during which he acted

⁵ *Adams v. Woods*, 8 Cal. 306.

⁷ *Stuart v. Boulware*, 133 U. S. 78.

⁶ *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 23 Fed. R. 675; *Bound v. South Carolina Ry. Co.*, 43 Fed. R. 404.

⁸ *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 23 Fed. R. 675.

as receiver of the property, for the use of which the rent was paid.⁹ Exceptions should not be taken after a master's report upon a receiver's accounting has been filed, the master acting in the place of the court in a judicial and not in a ministerial capacity.¹⁰ Should the receiver or any other party to the accounting feel aggrieved at a ruling of the master, he should take an exception at the time,¹¹ and subsequently petition the court to refer the matter back to the master for correction.¹² The court's duty upon such a petition consists in reviewing the principles and rules adopted and followed by the master in allowing the receiver's accounts, rather than in examining the items of the account in detail, or the evidence upon which those items are severally founded; the latter duty belonging more especially to the province of the master acting in his judicial capacity, analogous to the province and duty of a jury on questions of fact.¹³ In a proper case, the receiver, as well as any other party interested, may appeal to the Supreme Court from the final decree entered after his accounting.¹⁴

§ 258. **Compensation of Receivers.**—The compensation of a receiver is usually fixed in the first instance by the master.¹ with whose determination the court will not ordinarily interfere.² The compensation will rarely, if ever, be increased upon appeal.³ Where the court has fixed a receiver's compensation in advance, it has the power to award him an additional sum for extraordinary labors.⁴ Concerning the rules regulating the amount of a receiver's compensation, Mr. Justice Bradley said: "It would hardly be a proper rule for governing the case, to inquire what another even competent person would have been willing to do the work for. The receiver's office is not put up at auction. His compensation is not fixed on that principle at all. The

⁹ *In re Allin*, 8 Fed. R. 753.

¹⁰ *Cowdrey v. Railroad Co.*, 1 Woods, 331, 334.

¹¹ *Cowdrey v. Railroad Co.*, 1 Woods, 331, 333.

¹² *Cowdrey v. Railroad Co.*, 1 Woods, 331.

¹³ *Cowdrey v. Railroad Co.*, 1 Woods, 331, 334.

¹⁴ *Hinckley v. Gilman C. & S. R. R. Co.*, 94 U. S. 467; *Hinckley v. Railroad Co.*, 100 U. S. 153; *Hovey v. McDonald*, 109 U. S. 150.

§ 258. ¹ *Cowdrey v. Railroad Co.*, 1 Woods, 331, 341; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. R. 187.

² *Cowdrey v. Railroad Co.*, 1 Woods, 331, 341; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. R. 187.

³ *Hinckley v. Railroad Co.*, 100 U. S. 153; *Stuart v. Boulware*, 133 U. S. 78.

⁴ *Farmers' L. & Tr. Co. v. Central R. R. of Iowa*, 8 Fed. R. 60.

chancellor selects a person whom he regards as competent and trustworthy, and the amount of compensation is graduated somewhat by the duties and somewhat by the responsibilities of the situation."⁵ In cases of moderate amount, a commission of five per cent upon the receipts and disbursements is not unusual.⁶ Where the amounts received and disbursed are large, it is customary to pay the receiver a salary or a lump sum graduated according to the amount of his time employed, the value of the property, the difficulty of his task, and the success of his administration.⁷ It has been said that the peculiar duties and responsibilities and accountability of a receiver of a railroad entitle him to a larger amount than would be demanded by the head officer of a railroad of the same size and business.⁸ Accordingly, receivers of railroads have been frequently allowed as much as \$10,000 a year;⁹ and in one case two receivers were each allowed \$70,000 for three and a half years' work.¹⁰ In a late case \$4,500 a year to each of two receivers was considered adequate compensation.¹¹ In one case the same man had twice been appointed receiver of the same railroad. Firstly, in a stockholder's suit which remained in a State court, and secondly, in a bondholder's suit which was removed into a Federal court. The stockholder's suit was stricken from the docket; and the bondholder's suit pushed toward a determination. A dispute arose as to the compensation of the receiver. This was determined against him by the Circuit Court, and affirmed upon appeal by the Supreme Court of the United States, he being thus obliged to pay into court the amount thus decreed as due from him.¹² He then had the stockholder's suit reinstated in the State court and obtained a reference to a master who reported

⁵ *Cowdrey v. Railroad Co.*, 1 Woods, 331, 345, 346. Approved by *Brewer, J.*, in *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. R. 187, 188. See also *Williams v. Morgan*, 111 U. S. 684.

⁶ *Cowdrey v. Railroad Co.*, 1 Woods, 331, 346; *Day v. Croft*, 2 Beav. 488.

⁷ *Cowdrey v. Railroad Co.*, 1 Woods, 331, 346; *Farmers' L. & Tr. Co. v. Central R. R. of Iowa*, 8 Fed. R. 60; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. R. 187.

⁸ *Bradley, J.*, in *Cowdrey v. Railroad Co.*, 1 Woods, 331, 347. Approved by

Brewer, J., in *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. R. 187, 188.

⁹ *Hinckley v. Railroad Co.*, 100 U. S. 153; *Cowdrey v. Railroad Co.*, 1 Woods, 331, 347. But see *Farmers' L. & Tr. Co. v. Central R. R. of Iowa*, 8 Fed. R. 60.

¹⁰ *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. R. 187.

¹¹ *Easton & Houston & T. C. Ry. Co.*, 40 Fed. R. 189.

¹² *Hinckley v. Railroad Company*, 100 U. S. 153; *In re Hinckley*, 3 Fed. R. 556.

a large sum as due to him for compensation and disbursements. Neither the bondholders nor their trustees took any part in these proceedings in the State court. An application by the receiver to have the sum which he had been previously obliged to pay into the Federal court appropriated in part payment of the amount which the State court had allowed him was denied.¹³

§ 259. **Removal of Receivers.**—A receiver may be removed for misconduct in office,¹ or because his original appointment was obtained by collusion or fraud,² or was improper on account of his interest in the subject of the receivership or connection with the parties in interest.³ Instances of such misconduct as will be a cause for the removal of a receiver are unlawful discrimination in charges between different shippers upon a railroad;⁴ the purchase of supplies for the purpose of the receivership from a firm or corporation in which he is largely interested;⁵ and in the case of two receivers, where they are unable to act in harmony, and the interests of the estate suffer from their discord.⁶ A receiver will not be removed or discharged at his own request except for good cause shown, nor ordinarily for a reason which he knew or had ground to anticipate when he accepted the receivership.⁷ Thus the court refused to remove, at his own request, a receiver upon the sole ground that the duties of his office interfere with his private business.⁸ A receiver may be removed at his own request when by reason of blindness he has become physically incapable of performing the duties of his receivership.⁹ Ordinarily, a receiver can only be removed by the court which appointed him,¹⁰ upon an application made in the

¹³ *In re Hinckley*, 3 Fed. R. 556.

§ 259. ¹ *Handy v. Cleveland & Marietta R. R. Co.*, 31 Fed. R. 689; *Atkins v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. R. 161.

² *O'Mahoney v. Belmont*, 62 N. Y. 133; s. c. 37 N. Y. Superior Court, 223.

³ *Atkins v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. R. 161.

⁴ *Handy v. Cleveland & Marietta R. R. Co.*, 31 Fed. R. 689; *Atkins v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. R. 161. But see *Central Trust Co. v. Ohio Cent R. R. Co.*, 23 Fed. R. 306.

⁵ *Atkins v. Wabash, St. L. & P. Ry. Co.*, 29 Fed. R. 161.

⁶ *Meier v. Kansas Pacific R. R. Co.*, 5 Dill. 476. But see *Conner v. Belden*, 8 Daly (N. Y. C. P.), 257.

⁷ *Richardson v. Ward*, 6 Madd. 266; *Beers v. Chelsea Bank*, 4 Edw. Ch. (N. Y.) 277; *In re Lytle*, 3 Paige Ch. (N. Y.) 251; *Smith v. Vaughan*, Ridg. temp. Hardw. 251; *Beach on Receivers*, § 782.

⁸ *Beers v. Chelsea Bank*, 4 Edw. Ch. (N. Y.) 277. But see *Purdy v. Rapalye* (N. Y. Chancery, 1835); *Edwards on Receivers*, 661; *Beach on Receivers*, § 782.

⁹ *Richardson v. Ward*, 6 Madd. 266.

¹⁰ *Young v. Montgomery & E. R. R. Co.*, 2 Woods, 606, 618; *Alabama & C. R. R.*

suit in which his appointment was made.¹¹ A Federal court may, however, after the removal of a suit, remove a receiver therein appointed by a State court.¹² And it has been held that when a Circuit Court of the United States has appointed a receiver of a line of railroads running through another circuit, as well as through that wherein the appointment is made, his authority in the other circuit is recognized merely by judicial comity, and he may be removed from all control over property therein by the Federal court there held, upon a bill there filed.¹³ When a receiver is removed, the court may appoint another in his place. A delay of ten months after knowledge of the facts upon which the motion is founded, in moving for the discharge of a receivership and the removal of a receiver, has been held a sufficient reason for denying the application.¹⁴ The successor to a receiver can usually enforce, at least in equity, contracts made with his predecessor in his official capacity,¹⁵ and is usually responsible in his official capacity for liabilities incurred by his predecessor in the same manner as if he were a corporation sole.¹⁶ Whether a receiver who is not a party to a suit can appeal from an order for his removal is doubtful.¹⁷

§ 260. **Discharge of a Receiver.**—The discharge of a receiver is a termination of the receivership, and no successor to him is then appointed.¹ It will be ordered when the court is satisfied either that no occasion for a receivership existed when the appointment was made,² or that in the course of subsequent events the necessity for the receivership has ceased.³ Ordinarily, a receiver can be

Co. v. Jones, 7 N. B. R. 145, 169; Beach on Receivers, §§ 777, 778.

¹¹ Davis v. Michelbacher (S. C. Wis.), 31 N. W. R. 168; Beach on Receivers, §§ 777, 778.

¹² Texas & St. L. Ry. Co. v. Rust, 17 Fed. R. 275. See *infra*, §§ 260, 391.

¹³ Atkins v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 161. But see Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 29 Fed. R. 618; Muller v. Dows, 94 U. S. 444; Young v. Montgomery & E. R. R. Co., 2 Woods, 606, 618; Alabama & C. R. R. Co. v. Jones, 7 National Bankruptcy Register, 145, 169.

¹⁴ Brown v. Lake Superior Iron Co., 134 U. S. 530.

¹⁵ Thompson v. Phenix Insurance Co., 136 U. S. 287.

¹⁶ McNulta v. Lochridge, 141 U. S. 327.

¹⁷ See Conner v. Belden, 8 Daly (N. Y. C. P.), 257; Wilson v. Barney, 5 Hun (N. Y.), 257; Connolly v. Kretz, 78 N. Y. 620.

§ 260. ¹ Beach on Receivers, § 791.

² Lavender v. Lavender, Irish Rep. 9 Eq. 593; Furlong v. Edwards, 3 Md. 99; Sage v. Memphis & L. R. R. Co., 18 Fed. R. 571; s. c. 125 U. S. 361.

³ Davis v. Duke of Marlborough, 2 Swanst. 108, 168; Bainbrigg v. Blair, 3 Beav. 421.

discharged only by the court that appointed him.⁴ After the removal of a case from a State to a Federal court, the Federal court may discharge a receiver therein appointed.⁵ Any person injured by the appointment of a receiver can move for his discharge although not a party to the suit in which he was appointed.⁶ The motion should be made on notice to all parties interested.⁷ A motion for the discharge of a receiver may be denied on account of the laches of the moving party.⁸ A receiver of the estate of an infant will not be discharged until a year after the infant's majority, unless the ward after majority consents to his discharge.⁹ The receiver will not be discharged, as of course, at the motion of the party who procured his appointment, if other parties who have acquired an interest in the receivership object.¹⁰ The entry of a final decree which does not provide for the continuance of a receivership supersedes the appointment of a receiver.¹¹ A receiver may be discharged from the control of real estate, and the rents and profits which he has collected be continued in his control until the termination of the litigation.¹² It has been held that the discharge of a receiver by a decree cannot be set aside upon a motion entered after the term at which it was made.¹³ The discharge of a receiver terminates his liability for acts done in his official capacity.¹⁴ After a receiver's discharge damages to the estate resulting from his mismanagement cannot be recovered from the sureties upon an injunction bond concurrent with his appointment.¹⁵ Where a decree discharged a

⁴ *Young v. Montgomery & E. R. R. Co.*, 2 Woods, 606; *Beach on Receivers*, § 791.

⁵ *Texas & St. L. Ry. Co. v. Rust*, 17 Fed. R. 275; *Mahoney Mining Co. v. Bennett*, 4 Saw. 287. As to the disposition of the money in the hands of a receiver thus discharged, see *Mack v. Jones*, 31 Fed. R. 189, 196.

⁶ *Thomas v. Brigstocke*, 4 Russ. 64; *Grenfell v. Dean of Windsor*, 2 Beav. 544; *Milwaukie & Minnesota R. R. Co. v. Soutter*, 2 Wall. 510.

⁷ *Davis v. Duke of Marlborough*, 2 Swanst. 108, 118; *Bainbrigg v. Blair*, 3 Beav. 421, 423.

⁸ *Allen v. Dallas & W. R. R. Co.*, 3 Woods, 316, 331; *National Mechanics' Banking Assn. v. Mariposa Co.*, 60 Barb. (N. Y.) 423; *Hazard v. Credit Mobilier of*

America, 38 Fed. R. 195; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530.

⁹ *Matter of Van Horne*, 7 Paige Ch. (N. Y.) 346; *Wildridge v. McKane*, 2 Molloy, 545. See also *Bainbrigg v. Blair*, 3 Beav. 421.

¹⁰ *Bainbrigg v. Blair*, 3 Beav. 421; *People v. Globe Mutual Life Ins. Co.*, 57 How. Pr. (N. Y.) 481; *Fay v. Erie & K. R. R. Bank*, Harring. (Mich.) 194. See, however, *Davis v. Duke of Marlborough*, 2 Swanst. 108, 168; *Whiteside v. Prendergast*, 2 Barb. Ch. (N. Y.) 471.

¹¹ *Daniell's Ch. Pr.* (5th Am. ed.) 1765.

¹² *Jones v. Smith*, 40 Fed. R. 314.

¹³ *Davis v. Duncan*, 19 Fed. R. 477.

¹⁴ *Davis v. Duncan*, 19 Fed. R. 477; *White v. Keokuk & D. M. Ry. Co.*, 52 Iowa, 97.

¹⁵ *Lehman v. M'Quown*, 31 Fed. R. 138.

receiver upon condition that he should file a release from the person to whom the property was given by the decree, it was held that his omission to file the release did not make him liable to strangers for former injuries by his employees.¹⁶

¹⁶ *Davis v. Duncan*, 18 Fed. R. 477.

CHAPTER XVIII.

THE WRIT OF NE EXEAT REPUBLICA.

§ 261. **Definition of the Writ of Ne Exeat Republica, and when it will Issue.** — The writ of *ne exeat republica* is a writ which issues from a Federal court of equity to restrain a defendant to a suit therein from departing from the United States without the leave of the court.¹ In England it was called *ne exeat regno*, and was considered a writ of high prerogative. It was originally applicable to purposes of state only, but afterwards extended to private transactions.² In the United States the writ has hitherto been issued only at the request of a private party. The Revised Statutes provide that “writs of *ne exeat* may be granted by any justice of the Supreme Court, in cases where they might be granted by the Supreme Court; and by any circuit justice or circuit judge, in cases where they might be granted by the circuit court of which he is a judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.”³ It is unsettled whether the writ can now issue from a Federal court held in a State which has abolished imprisonment for debt.⁴ It has been held that the writ cannot be granted by a judge of the District Court,⁵ except when holding a court of equity.⁶ The intention of the defendant to depart from the judicial district is not enough to authorize the issue of the writ.⁷ The claim of the party applying for the writ must be one enforceable by a suit in a court of equity;⁸ except where a decree for permanent alimony has been entered and no appeal therefrom is pending, in which case the English rule was that the writ might issue

§ 261. ¹ Dan. Ch. Pr. (2d Am. ed.) 1925.

² Jackson v. Petrie, 10 Ves. 164; Dan. Ch. Pr. (2d Am. ed.) 1925; Beames on Ne Exeat, 1-21.

³ U. S. R. S. § 717.

⁴ Cf. U. S. R. S. § 990; Mallory Manuf. Co. v. Fox, 20 Fed. R. 409; and *infra*, § 370. See also, 24 Am. Law Review, 535.

⁵ Gernon v. Boecaline, 2 Wash. 130.

⁶ Lewis v. Shainwald, 7 Saw. 403, 417, 418.

⁷ Loewenstein v. Biernbaum, 8 Weekly Notes of Cas. (Pa.) 163.

⁸ Pearne v. Lisle, Ambler, 75; Seymour v. Hazard, 1 J. Ch. (N. Y.) 1.

to compel obedience to the same.⁹ The claim must be for the payment of a certain fixed sum of money.¹⁰ A claim for unliquidated damages is insufficient.¹¹ Thus, the writ cannot issue under a bill to set aside a bill of sale of a vessel, for a return of the vessel or her value, and for an account of her earnings.¹² The debt must be already due.¹³ A debt which is contingent,¹⁴ or certain but future,¹⁵ is insufficient. The motives for the defendant's departure, no matter how innocent they may be, — as, for example, that he is about to sail upon a ship of which he is captain,¹⁶ — will not prevent the issue of the writ.¹⁷

§ 262. **Against whom the Writ will Issue.**—The writ was originally confined to subjects of the King of England.¹ It has been extended, however, so as to apply to foreigners as well as subjects of the country from the courts of which the writ issues,² and where the court has jurisdiction, the writ may be issued at the suit of one foreigner against another.³ It seems that the writ may be issued against a married woman in a suit affecting her separate estate.⁴ The writ will not issue against a defendant who is under arrest or held to bail in an action at law.⁵ The Constitution provides that Senators and Representatives shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same.⁶ And the Revised Statutes, that whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or

⁹ *Pearne v. Lisle*, Ambler, 75; *Read v. Read*, 1 Ch. Cas. 115; *Ex parte Whitmore*, 1 Dickens, 143; *Shaftoe v. Shaftoe*, 7 Ves. 171; *Street v. Street*, 1 T. & R. 322; *Daniell's Ch. Pr.* (2d Am. ed.) 1926, 1927.

¹⁰ *Graham v. Stucken*, 4 Blatchf. 50; *Daniell's Ch. Pr.* (2d Am. ed.) 1931.

¹¹ *Graham v. Stucken*, 4 Blatchf. 50.

¹² *Graham v. Stucken*, 4 Blatchf. 50.

¹³ *Whitehouse v. Partridge*, 3 Swanst. 365, 377; *Seymour v. Hazard*, 1 J. Ch. (N. Y.) 1.

¹⁴ *Anon.*, 1 Atk. 521.

¹⁵ *Whitehouse v. Partridge*, 3 Swanst. 365, 377; *Seymour v. Hazard*, 1 J. Ch. (N. Y.) 1.

¹⁶ *Dick v. Swinton*, 1 V. & B. 371.

¹⁷ *Stewart v. Graham*, 19 Ves. 313; *Daniell's Ch. Pr.* (2d Am. ed.) 1934, 1935.

§ 262. ¹ *Daniell's Ch. Pr.* (2d Am. ed.) 1933; *Beames on Ne Exeat*, 1-20.

² *Flack v. Holm*, 1 J. & W. 405; *Daniell's Ch. Pr.* (2d Am. ed.) 1933, 1934.

³ *DeCarriere v. DeCalonne*, 4 Ves. 577; *Mitchell v. Bunch*, 2 Paige, (N. Y.), 606.

⁴ *Moore v. Hudson*, Mad. & Geld. 218; *Moore v. Meynell*, 1 Dickens, 30; *Daniell's Ch. Pr.* (2d Am. ed.) 191.

⁵ *Raynes v. Wyse*, 2 Meriv. 472; *Daniell's Ch. Pr.* (2d Am. ed.) 1930, 1931.

⁶ Constitution, Article I, § 6.

any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized, or attached, such writ or process shall be deemed void.⁷ Whenever any writ or process is sued out in violation of this statute, every person by whom the same is obtained or prosecuted, whether as party or as attorney or solicitor, and every officer concerned in executing it, is deemed a violator of the laws of nations and a disturber of the public repose, and is liable to imprisonment for not more than three years, and a fine at the discretion of the court.⁸ These regulations do not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States in the service of a public minister, and the process is founded upon a debt contracted before he entered upon such service; nor to any case where the person against whom the process issued is a domestic servant of a public minister, unless the name of the servant has, before the issuing thereof, been registered in the Department of State, and transmitted by the Secretary of State to the marshal of the District of Columbia, who is required, upon the receipt thereof, to post the same in some public place in his office.⁹ All persons may have access to the list of names so posted in the marshal's office, and may take copies without a fee.¹⁰

§ 263. Practice in obtaining the Writ of Ne Exeat. — The application for a writ of *ne exeat republica* may be made *ex parte*, even after the defendant has appeared.¹ The reason for allowing this is, that notice might frustrate the object of the motion by giving the party an opportunity of removing himself out of the jurisdiction.² It has been held in England that the writ cannot be obtained until a bill has been filed.³ The equity rules provide that the writ shall be asked for in the bill, when it is required "pending the suit."⁴ But it has been held that the writ may be granted at or after the decree, although the bill contains no such prayer.⁵ And by the English practice, no

⁷ U. S. R. S. § 4063. See *Ex parte* Cabrera, 1 Wash. C. C. 232; *United States v. Benner*, Baldwin, 234; *United States v. Lafontaine*, 4 Cranch C. C. 173.

⁸ U. S. R. S. § 4064.

⁹ U. S. R. S. § 4065.

¹⁰ U. S. R. S. § 4066.

§ 263. ¹ *Collinson v. —*, 18 Ves. 353; *Elliot v. Sinclair*, Jacob, 545.

² *Elliot v. Sinclair*, Jacob, 545.

³ *Ex parte* Brunker, 3 P. Wms. 312; *Mattocks v. Tremain*, 3 J. Ch. (N. Y.) 75. But see *Loyd v. Cardy*, Prec. in Ch. 171.

⁴ Rule 21. But see the language of Lord Eldon in *Collinson v. —*, 18 Ves. 353.

⁵ *Lewis v. Shainwald*, 7 Saw. 403, 417

prayer in the bill was required.⁶ The writ must be supported by an affidavit made by the complainant himself, or some person acquainted with the facts.⁷ The affidavit must be positive as to the facts, not merely upon information and belief,⁸ except in the case of an account, when the plaintiff may swear that, to the best of his belief, the sum named will be due to him on the balance of the account.⁹ A writ was discharged when it appeared from the affidavit that the affiant could not have had personal knowledge of the transaction to which he swore positively.¹⁰ The affidavit must be positive as to the intention of the defendant to go abroad, or to his threats or declarations, or those of members of his family or his agents, showing such an intention on his part.¹¹ An affidavit stating information from a stranger will ordinarily be insufficient.¹² It is prudent to state in the affidavit that the debt will be endangered by the defendant's quitting the country.¹³ Deficiencies in the affidavit may be supplied by admissions in the answer.¹⁴ The court may require as a condition for the issue of the writ that the complainant give an undertaking to respond in damages should the writ be afterwards discharged.¹⁵ The writ is directed to the marshal, and is in substantially the following form:—

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE MARSHAL OF THE SOUTHERN DISTRICT OF NEW YORK:

GREETING, — Whereas it is represented to us in our Circuit Court of the United States for the Southern District of New York in equity, on the part of JOHN ABER, complainant, against CHARLES DUTTON, defendant, (among other things) that he, the said defendant, is greatly indebted to the said complainant and designs quickly to go into parts without the United States (as by oath made on that behalf appears), which tends to the great prejudice and damage of the said complainant. Therefore, in order to prevent this injustice, we do

⁶ *Collinson v. —*, 18 Ves. 353; *Lewis v. Shainwald*, 7 Saw. 403, 416, 417.

⁷ *Collinson v. —*, 18 Ves. 353; *Mattocks v. Tremain*, 3 J. Ch. (N. Y.) 75.

⁸ *Rico v. Gualtier*, 3 Atk. 501; *Jackson v. Petrie*, 10 Ves. 164; *Mattocks v. Tremain*, 3 J. Ch. (N. Y.) 75.

⁹ *Rico v. Gualtier*, 3 Atk. 501; *Jackson v. Petrie*, 10 Ves. 164.

¹⁰ *Roddam v. Hetherington*, 5 Ves. 91.

¹¹ *Oldham v. Oldham*, 7 Ves. 410; *Collinson v. —*, 18 Ves. 353; *Knight v.*

Watts, 2 C. P. *Cooper temp. Cottenham*, 257.

¹² *Oldham v. Oldham*, 7 Ves. 410.

¹³ *Mattocks v. Tremain*, 3 J. Ch. (N. Y.) 75, 76; *Baker v. Haily*, 2 Dickens, 632; *Daniell's Ch. Pr.* (5th Am. ed.) 1708, and cases cited. But see *McGehee v. Polk*, 24 Ga. 406, 412.

¹⁴ *Roddam v. Hetherington*, 5 Ves. 91, 95.

¹⁵ *Daniell's Ch. Pr.* (5th Am. ed.) 1708.

hereby command you, that you do, without delay, cause the said CHARLES DUTTON personally to appear before you, and give sufficient bail or security in the sum of \$—— that the said CHARLES DUTTON will not go, or attempt to go, into parts without the United States, without leave of our said Court; and in case the said CHARLES DUTTON shall refuse to give such Bail or Security, then you are to commit the said CHARLES DUTTON to our next prison, there to be kept in safe custody, until he shall do it of his own accord; and, when you shall have taken such security, you are forthwith to make and return a certificate thereof to us in our said Circuit Court of the United States for the Southern District of New York distinctly and plainly under your hand, together with this Writ.

WITNESS, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, at the City of New York, in the County and State of New York, the thirteenth day of November, one thousand eight hundred and eighty-nine.¹⁶

The writ should be endorsed with the amount of the sum demanded written out in words at length.¹⁷ When it is issued against a personal representative by a person claiming a share of the residuary estate, it should be endorsed with the whole amount due from the defendant, not only to the plaintiff, but to all persons interested in the estate.¹⁸ When the writ is endorsed for a larger sum than is due, the court will ordinarily refuse to quash it, but will require the defendant to give security only for so much as is really due.¹⁹ The writ, upon its issue, must be delivered to the marshal. It is his duty thereupon to execute it by arresting the defendant named in it, and bringing him before the court.²⁰ He has no power to break open doors under the writ.²¹ The defendant may be released upon giving sufficient security to satisfy the marshal.²² After executing the writ, the marshal should make a return of what he has done.²³ The defendant may move at any time to discharge the writ, either for irregularity or upon the merits, by disproving the charges in the complainant's affidavits.²⁴ But it has been said by Lord Eldon, that where the plaintiff has sworn positively to the debt and to the defendant's

¹⁶ Beames on Ne Exeat, 23, 24.

¹⁷ Beames on Ne Exeat, 93.

¹⁸ Pannell v. Tayler, T. & R. 96, 100.

¹⁹ Pannell v. Tayler, T. & R. 96, 100.

²⁰ Daniell's Ch. Pr. (2d Am. ed.) 1943.

²¹ Beames on Ne Exeat, 95.

²² Beames on Ne Exeat, 96; Boehm v.

Wood, T. & R. 332, 340; Daniell's Ch. Pr. (2d Am. ed.) 1943.

²³ Daniell's Ch. Pr. (2d Am. ed.) 1945; Impey on Sheriffs (2d ed.), 532.

²⁴ Gernon v. Boecaline, 2 Wash. 130; Grant v. Grant, 3 Russ. 598, 602.

declarations of his intention to go abroad, the defendant's unsupported affidavit will be insufficient to contradict this.²⁵ If the writ is discharged, another writ may issue upon a new affidavit.²⁶ Upon payment into court of enough to satisfy the plaintiff's claim, the writ will always be discharged.²⁷ The writ may be discharged if the defendant gives sufficient security to satisfy the court.²⁸ The security usually required is conditioned that the defendant abide by the process and decree of the court;²⁹ but security that the defendant abide by and perform the process and decree of the court may be required.³⁰ The discharging order usually enjoins the defendant from bringing an action of false imprisonment;³¹ and the prosecution of such an action may be restrained by a subsequent order.³² If the court considers the writ improperly issued, it may direct a reference to a master to ascertain the damages sustained by the defendant, and direct the payment to him of the amount found due by the sureties upon the plaintiff's undertaking.³³ An amendment of the bill which does not materially alter the case does not discharge the writ.³⁴

²⁵ *Amsinck v. Barklay*, 8 Vesey, 594, 597; *Jones v. Alepsin*, 16 Vesey, 470, 471.

²⁶ *Gernon v. Boecaline*, 2 Wash. 130.

²⁷ *Evans v. Evans*, 1 Ves. Jr. 96.

²⁸ *Roddam v. Hetherington*, 5 Ves. 91, 95; *Boon v. Collingwood*, 1 Dickens, 115; *Beames on Ne Exeat*, 98, 99.

²⁹ *Griswold v. Hazard*, 141 U. S. 260, 281.

³⁰ *Griswold v. Hazard*, 141 U. S. 260, 281.

³¹ *Darley v. Nicholson*, 2 Dr. & War. 86.

³² *Darley v. Nicholson*, 2 Dr. & War. 86.

³³ *Sichel v. Raphael*, 4 L. T. N. s. 114.

³⁴ *Grant v. Grant*, 5 Russ. 189.

CHAPTER XIX.

EVIDENCE AT LAW AND IN EQUITY.

§ 264. **Evidence in General.** — The Revised Statutes provide that “the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided;”¹ and “the mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided for.”² Evidence consists of admissions upon the record, documents, and the testimony of witnesses. No objection can be taken, on an appeal to the Supreme Court, to the admissibility in evidence of any deposition, deed, grant, or other exhibit found in the record, unless the record shows that objection was taken thereto in the court below.³ The Federal courts take judicial notice of all public statutes, whether State or Federal,⁴ of public statutes of a former government exercising jurisdiction over the same territory,⁵ and of executive regulations authorized by acts of Congress which have the force of statutes.⁶ They will not take judicial notice of the filing by a railway company of the map of its route with the Secretary of the Interior.⁷

§ 265. **Admissions.** — Admissions upon the record are either actual or constructive. Actual admissions are made either in the pleadings or by agreement. Every statement of a fact material to the issues made in the pleadings or other documents used in support of the claim of any party to a suit, who is of full age, whether sworn to or not,¹ may be used as evidence against him upon the hearing. The filing of the general replication does

§ 264. ¹ U. S. R. S. § 861. See *Beardsley v. Littell*, 14 Blatchf. 102; *Ex parte Fisk*, 113 U. S. 713.

² U. S. R. S. § 862. See *Blease v. Garlington*, 92 U. S. 1.

³ Supreme Court Rule 13.

⁴ *Owings v. Hull*, 9 Pet. 607; *Gormley v. Bunyan*, 138 U. S. 623, 635.

⁵ U. S. v. *Perot*, 98 U. S. 438.

⁶ *United States v. Williams*, 6 Mont. 379.

⁷ *McKeoin v. Northern Pac. R. Co.*, 45 Fed. R. 464, 467.

§ 265. ¹ *Smith v. Potter*, 3 Wis. 432. An admission in an unverified pleading in another suit which was signed only by an attorney, cannot be admitted in evidence. *Delaware County Com'rs v. Diebold S. & L. Co.*, 133 U. S. 399.

not waive the right to rely on admissions in an answer or plea.² The statement by a defendant that he believes, or is informed and believes, that a certain fact occurred, is treated as an admission, unless coupled with some clause to prevent its being so considered.³ For it is a rule in equity that what the defendant believes, the court will believe.⁴ This rule, however, does not apply to the statement of a defendant that he believes that a will was executed as charged in the bill.⁵ Admissions in an answer made on behalf of an infant cannot be used against him,⁶ unless he adopts the answer after he has reached his majority.⁷ An admission of one defendant, whether in his answer or otherwise, is not evidence against any of his co-defendants,⁸ who is not his partner⁹ or who does not derive his title from him.¹⁰ The parties to a suit may, by an agreement signed by themselves or their solicitors or made in open court by their counsel, admit any fact as proven, or allow testimony to be taken in any manner, unless they thus commit an act repugnant to public policy.¹¹ No agreement between counsel will be enforced unless reduced to writing or made in open court.¹²

§ 266. **Constructive Admissions.** — Constructive admissions are those which are implied by law from a party's act. A constructive admission is made by the plaintiff when he files no general replication, but sets the cause down for a hearing upon bill and answer only; or when, in his bill, he does not expressly waive an answer under oath. In the former case, he admits for the purposes of the suit that all the allegations in the answer are

² *Cavender v. Cavender*, 8 Fed. R. 641.

³ *Potter v. Potter*, 1 Ves. Sen. 274; *Hill v. Binney*, 6 Ves. 738.

⁴ *Potter v. Potter*, 1 Ves. Sen. 274; *Hill v. Binney*, 6 Ves. 738.

⁵ *Potter v. Potter*, 1 Ves. Sen. 274; *Davies v. Davies*, 3 DeG. & Sm. 698.

⁶ *Leigh v. Ward*, 2 Ventris, 72; *Ecclleston v. Petty*, Carthew, 79; *Savage v. Carroll*, 1 Ball & Beatty, 548, 553; *Wrottesley v. Bendish*, 3 P. Wms. 235. See *Kingsbury v. Buckner*, 134 U. S. 650, 680.

⁷ *Hinde's Ch. Pr.* 422.

⁸ *Leeds v. Marine Ins. Co.*, 2 Wheat. 380; *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 153.

⁹ *Crosse v. Bedingfield*, 12 Simons, 35; *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 153, 156.

¹⁰ *Field v. Holland*, 6 Cranch, 8; *Osborn v. Bank of United States*, 9 Wheat. 738.

¹¹ *Barker v. Dixie*, Reports temp. Hardwicke, 252; *Owen v. Thomas*, 3 M. & K. 353, 357; *Nixon v. Albion Marine Ins. Co.*, L. R. 2 Ex. 338. For a case where the court refused to relieve a party from a stipulation, see *McNeill v. Town of Andes*, 40 Fed. R. 45. As to the power of the next friend of an infant to stipulate, see *Kingsbury v. Buckner*, 134 U. S. 650, 680. As to the power of a receiver to bind the estate by a stipulation, see *supra*, § 249.

¹² *Evans v. State National Bank*, 19 Fed. R. 676; *Lee v. Simpson*, 42 Fed. R. 434.

true;¹ in the latter, that all are true which he cannot contradict by the testimony of two witnesses, or of a single witness with corroborating circumstances.² This rule does not apply, however, unless the allegations in the answer are made positively.³ Thus, a denial according to the defendant's recollection and belief is insufficient for this purpose.⁴ So is an allegation upon information and belief.⁵ By setting down a plea for argument the plaintiff admits the truth of the allegations of fact therein contained.⁶ Constructive admissions are also made by a demurrer, a plea, or a default in pleading. A demurrer admits the truth of the allegations in the bill,⁷ but not of conclusions of law therein set forth.⁸ A plea admits the truth of so much of the bill as it does not deny.⁹ A default by the defendant's failing to file a demurrer, plea, or answer to the bill within the time allowed for that purpose entitles the plaintiff to enter an order taking the bill as confessed by him; whereupon the defendant is deemed to admit the truth of the allegations in the bill.¹⁰ Formerly in England no extra-judicial admissions of a defendant could be given in evidence unless they had been charged in the bill; but that rule probably would not now be followed here.¹¹ Other testimony also, which was of a kind likely to take a party by surprise, was formerly often excluded unless the pleadings called attention to it.¹²

§ 267. **Documentary Evidence in General.** — Documentary evidence consists of all those matters not contained in depositions or affidavits, which are submitted to the court in the shape of written documents. The rules regulating its admission are substantially the same in equity as at common law.¹ In equity,

§ 266. ¹ *United States v. Scott*, 3 Illinois M. & T. R. R. Co., 133 U. S. Woods, 334; *Kennedy v. Baylor*, 1 Wash. 290. (Va.) 162.

² *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 153, 160; *Union Bank of Georgetown v. Geary*, 5 Pet. 99, 110; *Seitz v. Mitchell*, 94 U. S. 580, 582; *Vigel v. Hopp*, 104 U. S. 441.

³ *Carpenter v. Providence Washington Ins. Co.*, 4 How. 185; *Taylor v. Luther*, 2 Sumner, 228; *Berry v. Sawyer*, 19 Fed. R. 286.

⁴ *Taylor v. Luther*, 2 Sumner, 228.

⁵ *Berry v. Sawyer*, 19 Fed. R. 286.

⁶ *Burrell v. Hackley*, 35 Fed. R. 833; *Burrell v. Pratt*, 35 Fed. R. 834; *Beals v.*

Pacific Railroad of Missouri v. Missouri Pacific Ry. Co., 111 U. S. 505, 522. See § 106.

⁷ *Dillon v. Barnard*, 21 Wall. 430. See § 106.

⁸ *Farley v. Kittson*, 120 U. S. 303.

⁹ Rules 18, 19. See §§ 103-104, ch. vii.

¹⁰ See § 59, and *Smith v. Burnham*, 2 Sumner, 612; *Jenkins v. Eldredge*, 3 Story, 181; *Story's Eq. Pl.* §§ 265 a.

¹¹ See § 69, and *Langdell's Eq. Pl.* § 60.

¹² See § 267. ¹ *Lake v. Phillips*, 1 Ch. Rep. 110; *Stevens v. Cooper*, 1 J. Ch. (N. Y.) 425, 429, and cases cited.

however, such documents as merely require proof of their execution or of the handwriting contained in them may be admitted in evidence at the hearing of the cause if accompanied by an affidavit of these facts, provided that an order, which is granted as of course, has been obtained and served upon the opposite side at least two days before.² In some cases, the courts have permitted the proof of such documents by word of mouth under oath at the hearing, when their existence and execution was not denied by the answer.³ According to the old English practice, the adverse party had no right, in the absence of special circumstances, to compel before the hearing the production of any exhibit, however it had been proved, — except, perhaps, when the deposition proving it had set it out *verbatim*; nor even to inspect it, it being considered that a party should not before the hearing see the strength of the cause, or any deed, to pick holes in it.⁴ The practice in the Federal courts seems to be otherwise. It has been held there that, in equity and at common law, either party may upon motion supported by affidavit, which affidavit may be controverted, compel the other party to produce for his inspection on the trial or hearing any books or other documents material to the issues, which are in his opponent's possession or under his opponent's control.⁵ It has been held that such an order will not be granted when the production of the papers can be compelled by a subpoena *duces tecum* which has been served.⁶ When a party inspects a document which he has compelled his adversary to produce under a subpoena *duces tecum*, and then fails to offer it in evidence, his adversary may put it in evidence.⁷ The production of applications for patents which do not interfere with caveats may thus be compelled.⁸ When a party had filed an exhibit drawn in pencil, a motion requiring him to refile it drawn in ink was denied.⁹ A party is not entitled to a general inspection of books and papers in his adversary's possession. In

² *Clare v. Wood*, 1 Hare, 314.

³ *Wood v. Mann*, 2 Sumner, 316; *Nesmith v. Calvert*, 1 W. & M. 34; *Attorney-General v. Pearson*, 7 Simons, 290, 303.

⁴ *Davers v. Davers*, 2 P. Wms. 410.

⁵ *Coit v. North Carolina Gold Amalgamating Co.*, 9 Fed. R. 577. Cf. U. S. R. S. § 724; and *infra*, § 372. But see *Guyot v. Hilton*, 32 Fed. R. 743; *Colgate & Compagnie Francaise*, 23 Fed. R. 82.

⁶ *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 44 Fed. R. 294, 300.

⁷ *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 45 Fed. R. 55.

⁸ *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 44 Fed. R. 294; s. c. 45 Fed. R. 55. But see Rule 15 of Patent Office; U. S. R. S. § 4902.

⁹ *Tubman v. Wason Manuf. Co.*, 44 Fed. R. 429.

the case of an inspection of books, the usual practice is to have all except the pages containing the material matter sealed up, and to have the inspection take place under the supervision of a master or commissioner.¹⁰ In an action to recover a penalty, whether brought by a private individual or by the United States, and in a proceeding to enforce a forfeiture of property, the defendant or owner of the property seized cannot be compelled to produce his books or papers or other articles of personal property for the inspection of the opposite party, and should such an inspection be compelled, the judgment may be reversed upon that ground alone.¹¹ It has been held that under a subpoena *duces tecum*, a witness cannot be compelled to produce patterns of the casting of a stove, or anything except books and papers.¹² A defendant may be compelled to state, when called as a witness by the plaintiff, whether he has in his possession a machine claimed to be an infringement of the plaintiff's patent, although the plaintiff has not previously made out a *prima facie* case of infringement.¹³ In a suit against the heir-at-law to establish the validity of a will, all the witnesses to the will who are alive, sane, and within the jurisdiction of the court, must be examined;¹⁴ and the testator's sanity must be proved affirmatively.¹⁵ This rule does not, however, apply to suits to establish the trusts of a will, or to appoint a new trustee, or in any other case when the validity of the will is not directly in issue.¹⁶

§ 268. **Federal Statutes regulating Admission of Documentary Evidence.** — The Revised Statutes of the United States provide as follows concerning the admission of documentary evidence: "Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof."¹ The mode of authentication pre-

¹⁰ *Robbins v. Denis*, 1 Blatchf. 238, 243.

¹¹ *Johnson v. Donaldson*, 18 Blatchf. 287; *Boyd v. United States*, 116 U. S. 616. See *United States v. Denicke*, 35 Fed. R. 407, 410.

¹² *In re Sheppard*, 3 Fed. R. 12.

¹³ *Delamater v. Reinhardt*, 43 Fed. R. 76; *per Lacombe, J. Contra, Celluloid Co. v. Crowe Co.*, U. S. C. C. 3d Circuit.

¹⁴ *Bootle v. Blundell*, 19 Ves. 494 b, 505.

¹⁵ *Harris v. Ingledew*, 3 P. Wms. 91; *Wallis v. Hodgeson*, 2 Atk. 56.

¹⁶ *Bootle v. Blundell*, 19 Ves. 494 b, 505; *Concannon v. Cruise*, 2 Molloy, 332.

§ 268. ¹ U. S. R. S. § 882. See *Barney v. Schneider*, 9 Wall. 248; *Chadwick v. United States*, 3 Fed. R. 750; *Block v. United States*, 7 Ct. Cl. 406; *United States v. Liddle*, 2 Wash. 205; *United States v. Benner*, Baldwin, 234; *White v. St. Guirons, Minor (Ala.)*, 331; *Cartlett v. Pacific Ins. Co.*, 1 Paine, 594; *Bleecker v. Bond*, 3 Wash. 529; *Thompson v. Smith*, 2 Bond, 320; *Wetmore v. United States*,

scribed by the statute must be strictly followed.² The words, "papers or documents," mean only such as are made by an officer and an agent of the government in the discharge of his official duty; and copies of such are not competent evidence unless it was the duty of the officer to file the originals.³ In the case of documents filed in the Treasury Department, an authentication under the seal of that department and the signature of the Secretary and the Assistant Secretary of the Treasury, will be sufficient.⁴ If the officer having charge of the paper certifies that the copy is correct and the head of a department certifies to the officer's character, the paper is sufficiently authenticated, provided that the seal from the department is attached thereto.⁵ The original cancelled register of a lost vessel has been held to come within the statute.⁶ Accounts and papers filed in the office of the Quartermaster-General, may thus be proved.⁷ In cases described in § 886 of the Revised Statutes, proof must be given in accordance with the provisions of that section.⁸ The original papers may also be put in evidence.⁹ In cases where the government is a party, duly authenticated copies should be procured and the fees therefor paid, and a mere notice to produce the original is not sufficient.¹⁰ Papers which were a part of the archives of the late so-called "Confederate Government" must be proved by proper testimony.¹¹ The certificate of the Secretary of the Spanish Governor of Florida is *prima facie* evidence of the existence of a grant of land.¹² "The volume of public documents, printed by authority of the Senate of the United States, containing let-

¹⁰ Pet. 647; *Wickliffe v. Hill*, 3 Litt. (Ky.) 330.

² *Smith v. United States*, 5 Pet. 291, 300; *Block v. United States*, 7 Ct. Cl., 406; *Bleecker v. Bond*, 3 Wash. 531; *United States v. Harrill*, Me. All. 243; *Wickliffe v. Hill*, 3 Litt. (Ky.) 330.

³ *Block v. United States*, 7 Ct. Cl. 406.

⁴ *Chadwicke v. United States*, 3 Fed. R. 750; *White v. St. Guirons*, Minor (Ala.), 331.

⁵ *Thompson v. Smith*, 2 Bond, 320; *Stevens v. Westwood*, 25 (Ala.) 716; *Crowell v. Hopkinton*, 45 N. H. 9; *Wetmore v. United States*, 10 Pet. 647. See *Wickliffe v. Hill*, 3 Litt. (Ky.) 330.

⁶ *Cattlett v. Specific Ins. Co.*, 1 Paine, 612; See *Bleecker v. Bond*, 3 Wash. 29.

⁷ *Thompson v. Smith*, 2 Bond, 320. See *Crowell v. Hopkinson*, 45 N. H. 9.

⁸ *United States v. Humason*, 8 Fed. R. 71.

⁹ *Bruce v. Manchester & K. R. R. Co.*, 19 Fed. R. 342.

¹⁰ *Barney v. Schneider*, 9 Wall. 248; *Chadwick v. United States*, 3 Fed. R. 750; *United States v. Scott*, 25 Fed. R. 470; *United States v. Benner*, Baldwin, 234; *United States v. Perchman*, 7 Pet. 51; *Winn v. Patterson*, 9 Pet. 663; *James v. Gordon*, 1 Wash. 333.

¹¹ *Chorbin v. United States*, 6 Ct. Cl. 430.

¹² *United States v. Wiggins*, 14 Pet. 334; *United States v. Acosta*, 1 How. 24.

ters to and from various officers of state, communicated by the President of the United States to the Senate, is as competent evidence as the original documents themselves.”¹³

“The design and meaning of this rule is not to convert incompetent and irrelevant evidence into competent and relevant evidence simply because it is contained in an official communication. Had the officer been testifying under oath, such an assertion would have been excluded as inadmissible, upon the ground that the statement itself implied the existence of primary and more original and explicit sources of information. The courts hold this rule which has been invoked to be limited to only such a statement in official documents as the officers are bound to make in the regular course of official duty. The statement of extraneous or independent circumstances, however naturally they may be deemed to have a place in the narrative, is no proof of such circumstances, and is, therefore, rejected.”¹⁴

“Copies of any documents, records, books, or papers in the office of the solicitor of the treasury, certified by him under the seal of his office, or, when his office is vacant, by the officer acting as solicitor for the time, shall be evidence equally with the originals.”¹⁵ “Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.”¹⁶

“Copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate.”¹⁷ A certificate is sufficient in the absence of any evidence that

¹³ *Whiton v. Albany Ins. Co.*, 109 Mass. 30.

¹⁴ *United States v. Corwin*, 129 U. S. 381, 386.

¹⁵ U. S. R. S. § 883.

¹⁶ U. S. R. S. § 884.

¹⁷ U. S. R. S. § 885; *First National Bank v. Kidd*, 20 Minn. 234; *Washington County Nat. Bank v. Lee*, 112 Mass. 521; *Merchants' Nat. Bank v. Glendon Co.*, 120 Mass. 97.

there is any other national bank of the same name at the same place.¹⁸

“When suit is brought in any case of delinquency of a revenue officer, or other person accountable for public money, a transcript from the books and proceedings of the Treasury Department certified by the Register and authenticated under the seal of the Department, or, when the suit involves the accounts of the War or Navy Departments, certified by the Auditors respectively charged with the examination of those accounts, and authenticated under the seal of the Treasury Department, shall be admitted as evidence, and the court trying the cause shall be authorized to grant judgment and award execution accordingly. And all copies of bonds, contracts, or other papers relating to, or connected with, the settlement of any account between the United States and an individual, when certified by the Register, or by such Auditor, as the case may be, to be true copies of the originals on file, and authenticated under the seal of the Department, may be annexed to such transcripts, and shall have equal validity, and be entitled to the same degree of credit which would be due to the original papers if produced and authenticated in court: provided, that where suit is brought upon a bond or other sealed instrument, and the defendant pleads ‘*non est factum*,’ or makes his motion to the court, verifying such plea or motion by his oath, the court may take the same into consideration, and, if it appears to be necessary for the attainment of justice, may require the production of the original bond, contract, or other paper specified in such affidavit.”¹⁹ This section applies to sureties as well as to principals.²⁰ It applies only to suits against persons accountable for public moneys as such.²¹ “There are two kinds of transcripts which the statute authorizes the proper officer to certify. First, a transcript from the ‘books and proceedings of the treasury’: and second, ‘copies of bonds, contracts, and other papers, &c., which remain on file, and relate to the settlement.’ Under the first head are included charges of moneys advanced or paid by the department to the agent, and an entry of items suspended, rejected, or placed to his credit. These all appear upon the books

¹⁸ *Washington Co. Nat. Bank v. Lee*, 112 Mass. 521.

¹⁹ U. S. R. S. § 886; *Bechtel v. United States*, 101 U. S. 597; *U. S. v. Bell*, 111 U. S. 477; *U. S. v. Stone*, 106 U. S. 525.

²⁰ *United States v. Ganner*, 19 Wall. 198.

²¹ *United States v. Radowitz*, 8 Rep. 263. See *United States v. Griffith*, 2 Cranch, C. C. 666.

of the department. The decision made on the vouchers exhibited, and the statement of the amount, constitute, in part, the proceedings of the treasury. Under the second head, copies of papers, which remain on file, and which have a relation to the settlement, may be certified. In this case it is essential that the officer certify that the transcripts 'are true copies of the originals which remain on file.'"²² "An account stated at the Treasury Department which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified under the Act of Congress. Such a statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books. In these cases, the officers may well certify, for they must have official knowledge of the facts stated. But where moneys come into the hands of an individual, as in the case under consideration, the books of the treasury do not exhibit the facts, nor can they be officially known to the officers of the department. In this case, therefore, the claim must be established not by the treasury statement, but by the evidence on which that statement was made."²³ A copy of a bond certified by the Secretary of the Treasury without the certificate of the register and auditor is insufficient.²⁴ The certificate should show that the transcript exhibits the final adjustment of the debits, as shown not by mere copies of original papers on the files, but upon the books and records of the department.²⁵

It seems that the balances struck by the treasury and charged as such are not evidence, but that the items should be stated.²⁶ A transcript from the books may be evidence of charges for moneys advanced or paid by the department to the agent, and claims, suspended, rejected, or placed to his credit; but not of

²² *Smith v. United States*, 5 Pet. 291, 300, 301; *per* Mr. Justice M'Lean.

²³ *United States v. Buford*, 3 Pet. 12, 29; *per* Mr. Justice M'Lean.

²⁴ *United States v. Humason*, 8 Fed. R. 71.

²⁵ *United States v. Pinson*, 102 U. S. 548; *Tiernan v. Jackson*, 5 Pet. 592; *United States v. Buford*, 3 Pet. 12; *Cox v. United States*, 6 Pet. 172; *United States v. Jones*, 8 Pet. 375; *Gratton v. United States*, 15 Pet. 336; *Hoyt v. United*

States, 10 How. 109; *Bruce v. United States*, 17 How. 437.

²⁶ *United States v. Edwards*, 1 McLean, 347; *United States v. Jones*, 8 Pet. 375; *Gratton v. United States*, 15 Pet. 336; *Hoyt v. United States* 10 How. 109; *United States v. Martin*, 2 Paine, 68; *United States v. Gaussen*, 19 Wall. 198; *United States v. Smith*, 35 Fed. R. 490; *United States v. Van Zandt*, 2 Cranch C. C. 338; *United States v. Kuhn*, 4 Cranch C. C. 401.

moneys received by him for the benefit of the United States from other sources than the department.²⁷ A transcript showing the money expended by the officers in supplying the default of the contractor to carry out his contract is competent evidence.²⁸ The government need not show that the party had notice of the adjustment or of the balance against him in the transcript.²⁹

"The statute says that a transcript from the books, shall be admitted as evidence. A transcript or a transcribing is substantially a copy. A copy from the books, and not of the books, shall be admissible in evidence. An extract from the books, a portion of the books, when authenticated to be a copy, may be given in evidence. While a garbled statement is not evidence, or a mutilated statement, wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account shall be transcribed as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books."³⁰ Treasury statements are only *prima facie* evidence of the correctness of the balance. The accounting officer may correct mistakes and restate balances.³¹ The errors made in striking the balance may be proved by the defendant by the procuring of the original vouchers, or otherwise.³² The defendant by accepting the credits given him does not waive the objection to the items on the debit side.³³

"Upon the trial of any indictment against any person for embezzling public moneys, it shall be sufficient evidence, for the purpose of showing a balance against such person, to produce a transcript from the books and proceedings of the Treasury Department, as provided by the preceding section."³⁴ "A copy of any return of a contract returned and filed in the returns-

²⁷ *United States v. Buford*, 3 Pet. 12; *United States v. Jones*, 8 Pet. 375.

²⁸ *United States v. Griffith*, 2 Cranch C. C. 666.

²⁹ *Watkins v. United States*, 9 Wall. 759.

³⁰ *United States v. Gausson*, 19 Wall. 212, 214; *per Mr. Justice Hunt*.

³¹ *Soule v. United States*, 100 U. S. 8, 11; *United States v. Ecksford*, 1 How. 250, 263; *United States v. Eggleston*, 4 Saw.

201; *United States v. Hunt*, 105 U. S. 183, 187. But see *United States v. Collier*, 3 Blatchf. 325; *Ex parte Randolph*, 2 Brock. 44.

³² *Soule v. United States*, 100 U. S. 8; *Bruce v. United States*, 17 How. 437; *United States v. Stone*, 106 U. S. 525.

³³ *United States v. Jones*, 8 Pet. 375.

³⁴ U. S. R. S. § 887. See *United States v. Gausson*, 19 Wall. 198.

office of the Department of the Interior, as provided by law, when certified by the clerk of the said office to be full and complete, and when authenticated by the seal of the Department, shall be evidence in any prosecution against any officer for falsely and corruptly swearing to the affidavit required by law to be made by such officer in making his return of any contract as required by law, to said returns-office.”³⁵

“Copies of the quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the sixth auditor, and transcripts from the money-order account-books of the post-office department, when certified by the sixth auditor under the seal of his office, shall be admitted as evidence in the courts of the United States, in civil suits and criminal prosecutions; and in any civil suit, in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.”³⁶

“In all suits for the recovery of balances due from postmasters, a copy, duly certified under the seal of the sixth auditor, of the statement of any postmaster, special agent, or other person, employed by the Postmaster-General, or the auditor for that purpose, that he has mailed a letter to such delinquent postmaster, at the post-office where the indebtedness accrued, or at his last usual place of abode; that a sufficient time has elapsed for said letter to have reached its destination in the ordinary course of the mail, and the payment of such balance has not been received, within the time designated in his instructions, shall be received as sufficient evidence in the courts of the United States or other courts, that a demand has been made upon the delinquent postmaster: but when the account of a late postmaster has been once adjusted and settled, and a demand has been made for the balance appearing to be due, and afterward allowances are made or credits entered, it shall not be necessary to make a further demand for the new balance found to be due.”³⁷

³⁵ U. S. R. S. § 888. See U. S. R. S. *United States v. Wikinson*, 12 How. 246; § 3744. *Postmaster-General v. Rice*, Gilp. 554;

³⁶ *United States Revised Statutes* § 889; *Lawrence v. United States*, 2 McLean, 581; *United States v. Snyder*, 14 Fed. R. 554. *United States v. Hodge*, 13 How. 478; *United States v. Hilliard*, 3 McLean, 324; ³⁷ U. S. R. S. § 890.

"Copies of any records, books, or papers in the general land office, authenticated by the seal and certified by the commissioner thereof, or, when his office is vacant, by the principal clerk, shall be evidence equally with the originals thereof. And literal exemplifications of any such records shall be held, when so introduced in evidence, to be of the same validity as if the names of the officers signing and countersigning the same had been fully inserted in such record."³⁸ This section only applies to official documents.³⁹ The words, "evidence equally with the originals," do not mean that in all cases the copy shall have the same probative force as the original, and that on a question as to some particular word or figure, the copy shall be as convincing as the original; it merely requires the copy to be regarded as of the same class in the grades of evidence, as to written and parol, and primary and secondary.⁴⁰ A party is not deprived of his title because of a defective record, if he has a perfect patent. A perfect record of a perfect patent proves the grant; but a perfect record of an imperfect patent, or an imperfect record of a perfect patent, has no such effect. In such a case, if a perfect patent has in fact issued, it must be proved in some other way than by the record.⁴¹ The defective record in the general land office, does not deprive a party of his rights, and the contents of the original may be shown if the record or transcript is not a true copy.⁴² "The names need not be fully inserted in the record, but it must appear in some form that the names were actually signed to the patent when it issued."⁴³ A perfect record of a perfect patent is presumptive evidence of its delivery to and acceptance by the grantee.⁴⁴ An entry in the books of the land-office, that the balance of the purchase-money was paid by the person "to whom the patent had issued," is some evidence that a patent issued, although no patent is produced.⁴⁵ A certificate by a receiver that a party has made full payment is evidence that such party has taken the steps necessary for a pre-emption.⁴⁶ A copy of a plat

³⁸ U. S. R. S. § 891.

³⁹ *Block v. United States*, 7 Ct. Cl. 406.

⁴⁰ *Campbell v. Laclede Gas Co.*, 119 U. S. 445, 449. See *Galt v. Galloway*, 4 Pet. 331.

⁴¹ *McGarrahan v. Mining Co.*, 96 U. S. 316, 323; *Campbell v. Laclede Gas Co.*, 119 U. S. 445, 449.

⁴² *McGarrahan v. Mining Co.*, 96 U. S.

316, 323; *Campbell v. Laclede Gas Co.*, 119 U. S. 445.

⁴³ *McGarrahan v. Mining Co.*, 96 U. S. 316, 323.

⁴⁴ *McGarrahan v. Mining Co.*, 96 U. S. 316, 323.

⁴⁵ *Willis v. Bucher*, 3 Wash. C. C. 369.

⁴⁶ *McDonald v. Edmonds*, 44 Cal. 328.

and description duly authenticated is admissible.⁴⁷ A connected plat of sundry tracts of land made and put together by an officer of the land office, which is not the copy of any record in such office, is not competent evidence.⁴⁸ Under this statute a certified copy of the records of the land office at Washington, concerning the location of a land warrant containing a description of the various acts of the register and receiver at the land office at Chicago, and of the locator in regard to the location, showing that the land was subject to location at the time, and that the land warrant was properly delivered up and deposited with the commissioner of the land office, is admissible in evidence.⁴⁹

“Written or printed copies of any records, books, papers, or drawings belonging to the patent office, and of letters-patent authenticated by the seal and certified by the commissioner or acting commissioner thereof, shall be evidence in all cases wherein the originals could be evidence; and any person making application therefor, and paying the fee required by law, shall have certified copies thereof.”⁵⁰ A transcript of certain documents on file is competent, although not a transcript of the whole proceedings.⁵¹ Proof that there is no record must be made by deposition or attendance in court of the proper officer; and a mere certificate that diligent search has been made is not sufficient.⁵² It seems that the court will presume that a person who signs as “Acting Commissioner” holds such office in the absence of evidence to the contrary.⁵³ Letters written by an applicant for a patent, when properly certified as papers remaining in the department, are admissible in evidence.⁵⁴ The documents which make up the original papers belong to the public archives, and a duly certified copy thereof is competent evidence, although some of these documents may contain private stipulations between the parties concerned.⁵⁵

A certified copy of a patent surrendered and cancelled is admissible to show that an improvement subsequently patented is not original, although the certificate does not show when it was

⁴⁷ *Harris v. Barnett*, 4 Blatchf. 369.

⁴⁸ *Griffith v. Truckhomer*, Pet. C. C. 166.

⁴⁹ *Culver v. Uthe*, 133 U. S. 655.

⁵⁰ U. S. R. S. § 892.

⁵¹ *Toohy v. Harding*, 1 Fed. R. 174.

⁵² *Stoner v. Ellis*, 6 Ind. 152; *Bullock v. Wallingford*, 55 N. H. 619; *American*

Depot Co. v. Sheldon, 17 Blatch. 210, *Stone v. Palmer*, 28 Mo. 539.

⁵³ *Woodworth v. Hall*, 1 Wood. & M. 248.

⁵⁴ *Pettibone v. Derringer*, 4 Wash. C. C. 215, 219.

⁵⁵ *Hanrick v. Barton*, 16 Wall. 166.

cancelled, or how, or for what defect.⁵⁶ A certified copy of an assignment is *prima facie* evidence of the genuineness of the original and of the correctness of the copy of the record.⁵⁷ A certified copy of a transfer not required by law to be recorded is not proof of the transfer.⁵⁸ He who desires a copy of papers filed in the patent office must make demand therefor in a proper manner, without insulting or abusing the officers; but if a second demand is properly made, the commissioner cannot refuse to comply because of the applicant's previous improper conduct.⁵⁹ "Copies of the specifications and drawings of foreign letters-patent, certified as provided in the preceding section, shall be *prima facie* evidence of the fact of the granting of such letters-patent, and of the date and contents thereof."⁶⁰ Courts of the United States take judicial notice of foreign nations and their seals of state, but not of their inferior officers or departments and the seals of such inferior officers or departments.⁶¹ A copy of a French patent certified by the director of the Conservatoire National des Arts et Métiers of France, under the seal of that department, verified by the minister of agriculture and commerce, and the minister of foreign affairs, under their seals, but not by the great seal of France, may be admitted in evidence.⁶² "The printed copies of specifications and drawings of patents, which the Commissioner of Patents is authorized to print for gratuitous distribution, and to deposit in the capitols of the States and Territories, and in the clerk's offices of the district courts, shall, when certified by him and authenticated by the seal of his office, be received in all courts as evidence of all matters therein contained."⁶³

"Extracts from the journals of the senate, or of the house of representatives, and of the executive journal of the senate when the injunction of secrecy is removed, certified by the secretary of the senate or by the clerk of the house of representatives, shall be admitted as evidence in the courts of the United States, and

⁵⁶ *Delano v. Scott*, Gilp. 489.

⁵⁷ *Lee v. Blandy*, 1 Bond, 361; *Brooks v. Jenkins*, 3 M'Lean, 432; *Parker v. Haworth*, 4 McLean, 370.

⁵⁸ *Sherman v. Champlain Trans. Co.*, 31 Vt. 162.

⁵⁹ *Boydell v. Burke*, 14 How. 575.

⁶⁰ U. S. R. S. § 893.

⁶¹ *Schoerken v. Swift & C. & B. Co.*, 7 Fed. R. 469, 471; *Church v. Hubbard*, 2 Cranch, 187.

⁶² *Schoerken v. Swift C. & B. Co.*, 7 Fed. R. 469, 471. See *Deflorz v. Reynolds*, 17 Blatchf. 436.

⁶³ U. S. R. S. § 894.

shall have the same force and effect as the originals would have if produced and authenticated in court.”⁶⁴

“Copies of all official documents and papers in the office of any consul, vice-consul, or commercial agent of the United States, and of all official entries in the books or records of any such office, certified under the hand and seal of such officer, shall be admitted in evidence in the courts of the United States.”⁶⁵ The certificate of a consul is competent evidence to prove his official acts, but not acts which are not official or not within his personal knowledge.⁶⁶ The consul’s certificate is competent to prove that the ship’s papers were lodged with him;⁶⁷ that a seaman was discharged in a foreign court with his own consent;⁶⁸ and when it sets out all the essential facts it is *prima facie* evidence that a master violated the law in refusing to receive a discharged seaman in a foreign port.⁶⁹ A consular certificate is not competent to prove facts to justify imprisonment of a seaman by the master in a foreign port;⁷⁰ nor to authenticate the record of the condemnation of a vessel in a court of vice admiralty;⁷¹ nor to prove a foreign law or the correctness of a translation;⁷² nor to prove any fact between third persons, unless made so by statute;⁷³ nor to prove a copy of a bill of lading in another’s possession.⁷⁴ A certificate with an undecipherable seal and signature, is not admissible in evidence.⁷⁵

“The transcripts into new books, made by the clerks of the District Courts in the several districts of Texas, Florida, Wisconsin, Minnesota, Iowa, and Kansas, in pursuance of the act of June twenty-seven, eighteen hundred and sixty-four, chapter one hundred and sixty-five, from the records and journals transferred by them respectively, under the said act, to the clerks of the Cir-

⁶⁴ U. S. R. S. § 895.

⁶⁵ U. S. R. S. § 896; *Levy v. Burley*, 2 Sumner, 355; *Mathews v. Offley*, 3 Sumner, 115; *Brown v. The Independence*, Crabbe, 54; *Church v. Hubbard*, 2 Cranch, 186; *Lamb v. Briard*, Abbott’s Adm. 367; *The Atlantic*, Abbott’s Adm. 451; *United States v. Mitchell*, 2 Wash. 478; *Johnson v. The Cariolanus*, Crabbe, 239.

⁶⁶ *Brown v. The Independence*, Crabbe, 54.

⁶⁷ *United States v. Mitchell*, 2 Wash. 478.

⁶⁸ *Lamb v. Briard*, Abb. Adm. 367.

⁶⁹ *Mathews v. Offley*, 3 Sumn. 115.

⁷⁰ *Johnson v. The Cariolanus*, Crabbe, 239.

⁷¹ *Catlett v. Pacific Ins. Co.*, 1 Paine, 594.

⁷² *Church v. Hubbard*, 2 Cranch, 187.

⁷³ *United States v. Mitchell*, 2 Wash. 478; *The Alice*, 12 Fed. R. 923; *Stein v. Bowman*, 13 Pet. 209; *Levy v. Burley*, 2 Sumn. 355.

⁷⁴ *The Alice*, 12 Fed. R. 923.

⁷⁵ *The Atlantic*, Abb. Adm. 451.

cuit Courts in the said districts, when certified by the clerks respectively, making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said Circuit Courts, respectively, of transcripts of any of the books or papers so transferred to them, shall be received in evidence with the like effect as if made by the clerk of the court in which the proceedings were had.”⁷⁶ “The transcripts into new books made by the clerks of the Circuit and District Courts for the western district of North Carolina, in pursuance of the act of June four, eighteen hundred and seventy-two, chapter two hundred and eighty-two, when certified by the clerks respectively, making the same to be full and true copies from the original books, shall have the same force and effect as records as the originals. And the certificates of the clerks of said Circuit and District Courts respectively, of transcripts of any of the said transcribed records, shall also be received in evidence with the like effect as if made by the proper clerk from the originals from which such records were transcribed.”⁷⁷ “When the record of any judgment, decree, or other proceeding of any court of the United States is lost or destroyed, any party or person interested therein may, on application to such court, and on showing to its satisfaction that the same was lost or destroyed without his fault, obtain from it an order authorizing such defect to be supplied by a duly certified copy of the original record, where the same can be obtained; and such certified copy shall thereafter have, in all respects, the same effect as the original record would have had.”⁷⁸ “When any such record is lost or destroyed, and the defect cannot be supplied as provided in the preceding section, any party or person interested therein may make a written application to the court to which the record belonged, verified by affidavit, showing such loss or destruction; that the same occurred without his fault or neglect: that certified copies of such record cannot be obtained by him; and showing also the substance of the record so lost or destroyed, and that the loss or destruction thereof, unless supplied, will or may result in damage to him. The court shall cause said application to be entered of record, and a copy of it shall be served personally upon every person interested therein,

⁷⁶ U. S. R. S. § 897.

⁷⁷ U. S. R. S. § 898.

⁷⁸ U. S. R. S. § 899; *Cornett v. Williams*, 20 Wall. 226.

together with a written notice that on a day therein stated, which shall not be less than sixty days after such service, said application will be heard; and if, upon such hearing, the court is satisfied that the statements contained in the application are true, it shall make and cause to be entered of record an order reciting the substance and effect of said lost or destroyed record. Said order shall have the same effect, so far as concerns the party or person making such application and the persons served as above provided, but subject to intervening rights, which the original record would have had, if the same had not been lost or destroyed.”⁷⁹ “When any cause has been removed to the supreme court, and the original record thereof is afterward lost, a duly certified copy of the record remaining in said court may be filed in the court from which the cause was removed, on motion of any party or person claiming to be interested therein; and the copy so filed shall have the same effect as the original record would have had if the same had not been lost or destroyed.”⁸⁰ “In any proceedings in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any non-resident of the district in which such court is held anywhere within the jurisdiction of the United States, or in any foreign country; the proof of service of such notice, if made in a foreign country, to be certified by a minister or consul of the United States in such country, under his official seal.”⁸¹ “A certified copy of the official return, or any other official paper of the United States attorney, marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return paper, or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return paper, or document, it shall be lawful for the court in

⁷⁹ U. S. R. S. § 900.

⁸⁰ U. S. R. S. § 901

⁸¹ U. S. R. S. § 902, as amended by Act

of Jan 31, 1879, ch. xxxix, § 1 (20 St. at L 277).

which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers, or records of any court of the United States have been or shall be lost or destroyed, the files, records, and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files, and papers, shall have the same force and effect to all intents and purposes, as the originals thereof would have been entitled to.”⁸² “Whenever any of the records or files in which the United States are interested of any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices, and other books and papers as said judges shall think proper. Said judges may direct the performance, by clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation, for services in the matter and for lawful disbursements, as may be approved by the attorney-general of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund.”⁸³

“The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto. The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief-justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenti-

⁸² U. S. R. S. § 903, as amended by Act of Jan. 31, 1879, ch. xxxix, § 2 (20 St. at L. 277).

⁸³ U. S. R. S. § 904, as amended by Act of Jan. 31, 1879, ch. xxxix, § 3 (20 St. at L. 278).

cated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.”⁸⁴ This statute applies to the Federal courts as well as to the State courts.⁸⁵ The courts of the United States take judicial notice of the public acts of the legislatures of the different States.⁸⁶ It will be presumed that the seal of a State was annexed to a paper by the proper officer under due authority.⁸⁷ The certificate must show that the person who signed it as judge was, when he signed it, the judge, chief justice, or presiding magistrate of the court in which the judgment is of record.⁸⁸ If the laws of a State show that the court in which the judgment was rendered consisted of but a single judge, it is not material in a Federal court that the certificate to the attestation of the clerk did not show that the certifying officer was the sole judge, chief justice, or presiding magistrate.⁸⁹ The certificate of the judge that he is “one of the judges” of the court, is insufficient.⁹⁰ The judge should certify that the attestation is in due form according to the laws of the State.⁹¹ If a clerk of a court certifies at the foot of a paper which purports to be a record, that the foregoing is truly taken from the record of proceedings of his court, and if the judge, chief justice, or presiding magistrate certifies that such attestation of the clerk is in due form of law, it is to be presumed that the paper so certified is in due form, and is a full copy of the proceedings in the case, and is admissible in evidence; but if it proves to be a mere transcript of minutes taken from the docket of the court, it is not admissible.⁹² If a judgment has been recovered against a corporation by a wrong name, there may be a recovery in a suit on such judgment in another State brought against it by the proper name.⁹³

“All records and exemplifications of books, which may be kept

⁸⁴ U. S. R. S. § 905. The cases construing this section of the Revised Statutes are very numerous, and may be found collected in Greenleaf on Evidence, §§ 504-506; Bump's Federal Procedure, 565-617.

⁸⁵ *Gormley v. Bunyan*, 138 U. S. 623, 635; *Mills v. Duryee*, 7 Cranch, 481; *Galpin v. Sage*, 3 Saw. 93.

⁸⁶ *Owings v. Hull*, 9 Pet. 607.

⁸⁷ *United States v. Johns*, 4 Dall. 412;

s. c. 1 Wash. C. C. 363; *United States v. Amedy*, 11 Wheat. 392.

⁸⁸ *Stewart v. Gray*, Hamps. 94; *United States v. Biebusch*, 1 McCrary, 42; 1 Fed. R. 213.

⁸⁹ *Bennett v. Bennett*, Deady, 299.

⁹⁰ *Stewart v. Gray*, Hamps. 94; *Gardner v. Lindo*, 1 Cranch C. C. 78.

⁹¹ *Craig v. Brown*, Pet. C. C. 352.

⁹² *Ferguson v. Harwood*, 7 Cranch, 408.

⁹³ *La Fayette Ins. Co. v. French*, 18 How. 404.

in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken."⁹⁴ This section does not impart to the authenticated State record anything more than "faith and credit," and does not extend the effect of a decision against a State to the United States, nor make an award or judgment which might be final against a State either obligatory in law or conclusive against the United States.⁹⁵ Where a deed of land in Texas had been executed in accordance with the civil laws in Louisiana, and a copy furnished to the grantee as a second original, this copy was admitted in evidence, upon proof by the witness that he had examined the original on file in the notary's book; that the copy was a true one; that the notary before whom the conveyance was executed was dead; that the witness knew the handwriting, which was genuine; that the witness knew the handwriting of one of

⁹⁴ U. S. R. S. § 906. See also *Snyder v. Wise*, 10 Pa. St. 157; *Lawrence v. Gaultney*, Cheves Law (S. C.), 7; *King v. Dale*, 2 Ill. 513; *Henthorn v. Doe*, 1 Blackford (Ind.), 157; *Russell v. Kearney*, 27 Ga. 96; *Paca v. Dutton*, 4 Mo. 371; *Karr v. Jack-*

son, 28 Mo. 316; *Grant v. Henry Clay Coal Co.*, 80 Pa. St. 208; and authorities cited in *Bump's Federal Procedure*, 617-619.

⁹⁵ *Williams v. United States*, 137 U. S. 113, 186.

the subscribing witnesses ; that such witness was dead ; and that the signature of such subscribing witness was genuine.⁹⁶ A pardon certified under the great seal of the State was admitted in evidence.⁹⁷ A copy of a survey certified by the register, by the judge, and by the secretary of state under the great seal, was admitted in evidence.⁹⁸ The clerk's certificate should show that the judge is the presiding judge, or that he is the presiding judge for the district.⁹⁹ This statute does not apply to court records.¹⁰⁰

"It shall be lawful for any keeper or person having the custody of laws, judgments, orders, decrees, journals, correspondence, or other public documents of any foreign government or its agents, relating to the title to lands claimed by or under the United States, on the application of the head of one of the Departments, the Solicitor of the Treasury, or the Commissioner of the General Land Office, to authenticate copies thereof under his hand and seal, and to certify them to be correct and true copies of such laws, judgments, orders, decrees, journals, correspondence, or other public documents, respectively ; and when such copies are certified by an American minister or consul, under his hand and seal of office, to be true copies of the originals, they shall be sealed up by him and returned to the Solicitor of the Treasury, who shall file them in his office, and cause them to be recorded in a book kept for that purpose. A copy of any such law, judgment, order, decree, journal, correspondence, or other public document, so filed, or of the same so recorded in said book, may be read in evidence in any court, where the title to land claimed under or by the United States may come into question, equally with the originals." ¹⁰¹

"The edition of the laws and treaties of the United States, published by Little & Brown, shall be competent evidence of the several public and private acts of Congress, and of the several treaties therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof." ¹⁰²

⁹⁶ *White v. Bromley*, 20 How. 235, 250.

⁹⁷ *United States v. Wilson*, Baldwin, 78.

⁹⁸ *Smith v. Redden*, 5 Harr (Del.) 321.

⁹⁹ *Paca v. Dutton*, 4 Mo. 370.

¹⁰⁰ *Tarleton v. Briscoe*, 1 A. K. Marsh. (Ky.) 67 ; U. S. R. S., § 905 ; *Snyder*

v. Wise, 10 Pa. 157 ; *Law v. Gaultney*, Cheves (S. C.) Law, 7.

¹⁰¹ U. S. R. S § 907 ; *Ten Cases v. United States*, 34 Fed. R. 101 ; *Chadwick v. United States*, 3 Fed. R. 753.

¹⁰² U. S. R. S § 908. See also act of

"In suits or informations brought, where any seizure is made pursuant to an act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant: provided that probable cause is shown for such prosecution, to be judged of by the court."¹⁰³

§ 269. **Definition and Use of an Affidavit.** — An affidavit is a declaration upon oath or affirmation before some persons having competent and lawful power and authority to administer the same. Affidavits are used in a suit in equity in three ways. In certain cases they must be annexed to a bill before it can be properly filed;¹ certain documents may be proved by them at the hearing;² and they are used in support of interlocutory applications.³ The manner of their use has been already described. It is unsettled whether the court has power to compel any one to have his affidavit taken,⁴ or to cross-examine an affiant,⁵ except, possibly, by means of a feigned issue.

§ 270. **Manner of Verifying an Affidavit.** — An affidavit must be sworn to; unless the affiant is conscientiously scrupulous of taking an oath, when he may, in lieu thereof, make solemn affirmation of the truth of the facts stated by him.¹ If the deponent be blind or unable to read, the affidavit must be read over to him by the officer before whom he swears to its truth.² An affidavit, if made within the United States, must be verified before a judge of the court in which it is to be used, or a United States commissioner, or a notary public.³ If made without the United States, it may be verified before any secretary of legation, or consular officer within the limits of his legation, consulate, or com-

June 20, 1874, ch. 333, § 8 (18 St. at L. 114); Act of June 7, 1880, Res. 44 (21 St. at L. 308).

¹⁰³ U. S. R. S. § 909. See also *Locke v. United States*, 7 Cranch, 339; *The Luminary*, 8 Wheat. 407; *Wood v. United States*, 16 Pet. 342; *The John Griffin*, 15 Wall. 29; *Clifton v. United States*, 4 How. 242; *Taylor v. United States*, 3 How. 197; *Buckley v. United States*, 4 How. 251; *Cliquot's Champagne*, 3 Wall. 114.

§ 269. ¹ See § 87.

² See § 269.

³ See Chapter XV.

⁴ See *Hammerschlag Manufacturing Co. v. Judd*, 26 Fed. R. 292; *Bacon v. Magee*, 7 Cowen (N. Y.), 515; *Day v. Boston Belting Co.*, 6 Law Rep. (N. S.) 329.

⁵ See *Day v. Boston Belting Co.*, 6 Law Rep. (N. S.) 329; *Hammerschlag Manuf. Co. v. Judd*, 26 Fed. R. 292.

§ 270. ¹ Rule 91; U. S. R. S. §§ 1,5013.

² *Matter of Christie*, 5 Paige (N. Y.), 242.

³ U. S. R. S. §§ 725, 945; L. 1876, ch. 304; U. S. R. S. 1st Supp. 251 (19 U. S. St. at L. 206); *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601.

mercial agency ;⁴ or, perhaps, before any person who, by the laws of the country in which the affidavit is made, is authorized to administer an oath or affirmation.⁵

§ 271. **Title of an Affidavit.** — An affidavit should be correctly entitled in the cause or matter in which it is made.¹ For, otherwise, it is said that the affiant cannot be convicted of perjury if his statements are false.² But, it seems that, if there are several parties on either side, or both sides, it will be sufficient to entitle it in the name of a single plaintiff and defendant, and after each to insert the word “others” or “another,” according to the circumstances of the case.³ The omission of a party's christian name will not be a fatal defect.⁴ If the affidavit is correctly entitled when made, it can still be used after the title of the cause has been subsequently changed.⁵ If an affidavit of service be attached to papers which are themselves correctly entitled, it needs no separate title.⁶ An affidavit made or entitled in one cause cannot, it has been held, be used in another;⁷ unless, perhaps, when the affiant is dead, insane, imbecile, or beyond the jurisdiction of the court.

§ 272. **Form of an Affidavit.** — Every affidavit should begin with the *venire*, — that is, the name of the county ;¹ and if sworn to elsewhere than in that where the court is held, with the name of the State where it is taken ; which is usually followed by the abbreviation *Ss. for scilicet*, or the English words *to wit*. Otherwise, it has been held, though not by a Federal court, that it may be disregarded as a nullity, even though the residence of an officer before whom it is sworn appear in the jurat.² The English rule was that in all affidavits the true place of residence, description, and addition of every person swearing to the same, must be in-

⁴ U. S. R. S. § 1750.

⁵ *Pinkerton v. The Barnsley Canal Co.*, 3 Y. & J. 277 n.

§ 271. ¹ *Hawley v. Donnelly*, 8 Paige (N. Y.), 415 ; *Stafford v. Brown*, 4 Paige (N. Y.), 360. But see *Bowman v. Sheldon*, 5 Sand. (N. Y.) 657.

² *Hawley v. Donnelly*, 8 Paige (N. Y.), 415.

³ *White v. Hess*, 8 Paige (N. Y.), 544.

⁴ *Maury v. Van Arnum*, 1 Hill (N. Y.), 370.

⁵ *Hawes v. Bamford*, 9 Simons, 653.

⁶ *Anon.*, 4 Hill (N. Y.), 597.

⁷ *Lumbrozo v. White*, 1 Dickens, 150 ; *Daniell's Ch. Pr.* 1774 ; *Milliken v. Selye*, 3 Denio (N. Y.), 54 ; *Stacy v. Farnham*, 2 How. Pr. (N. Y.) 26. But see *Barnard v. Heydrick*, 49 Barb. (N. Y.) 62, 72 ; s. c. 2 Abbott's Pr. n. s. (N. Y.) 47 ; *Langston v. Wetherell*, 14 Mees. & W. 104.

§ 272. ¹ *Belden v. Devoe*, 12 Wendell (N. Y.), 223.

² *Cook v. Staats*, 18 Barb. (N. Y.) 407 ; *Lane v. Morse*, 6 How. Pr. (N. Y.) 394. But see *Mosher v. Heydrick*, 45 Barb. (N. Y.) 549 ; s. c. 30 How. Pr. (N. Y.) 161.

serted; unless the affidavits were made by parties in the cause, who might describe themselves, in the affidavit, as the above-named plaintiff, or defendant, without specifying any residence, or addition, or other description.³ This rule, however, is not always adhered to or insisted upon by practitioners in the courts of the United States. The English rule was that the stating part of the affidavit must be preceded by the statement that the deponent was duly sworn.⁴ The affidavit should state "sufficient to sustain the case made by the motion or petition of which it is the ground work."⁵ Its statements must be made with sufficient certainty, and with all necessary circumstances of time, place, manner, and other material incidents.⁶ When, however, the affiant deposes to words spoken, the addition "or to that effect" is not improper.⁷ Special fulness is required of affidavits of service.⁸ An affidavit should state facts and not conclusions of law;⁹ and must be pertinent, material, and not scandalous.¹⁰ The court may, upon examination of the paper, order such matter expunged with costs, to be paid by the party or solicitor seeking to use the same;¹¹ or a reference may be ordered to determine whether the statements in it are proper.¹² A reference can only be demanded upon exceptions in writing similar to those to a pleading;¹³ and the filing or reading of affidavits in opposition to such parts of his opponent's affidavits as are excepted to may be construed as a waiver of the exceptions.¹⁴ Pending a reference concerning it, an affidavit cannot be used except by leave of the court, which is usually granted only upon terms.¹⁵

§ 273. **Execution of an Affidavit.** — It is usual, though it seems not indispensable, for the affiant to subscribe his christian name and surname at the foot of the affidavit.¹ In England the signature

³ Daniell's Ch. Pr. (2d Am. ed.) 1775. See also Hinde's Pr. 451; Crockett v. Bishton, 2 Madd. 446.

⁴ Phillips v. Prentice, 2 Hare, 542; Daniell's Ch. Pr. (2d Am. ed.) 1776.

⁵ Daniell's Ch. Pr. (2d Am. ed.) 1776; Hinde's Pr. 451; Van Wyck v. Reid, 10 How. Pr. (N. Y.), 366.

⁶ Sea Insurance Co. v. Stebbins, 8 Paige (N. Y.), 565; Meach v. Chappell, 8 Paige (N. Y.), 135.

⁷ Ayliffe v. Murray, 2 Atk. 58, 60.

⁸ Hinde's Pr. 453.

⁹ Powell v. Kane, 5 Paige (N. Y.), 265.

¹⁰ Powell v. Kane, 5 Paige (N. Y.), 265.

¹¹ Powell v. Kane, 5 Paige (N. Y.), 265; *Ex parte Smith*, 1 Atk. 139.

¹² Daniell's Ch. Pr. (2d Am. ed.) 1777. See § 68.

¹³ Daniell's Ch. Pr. (2d Am. ed.) 1777. See § 68.

¹⁴ Bickford v. Skewes, 8 Simons, 206; Daniell's Ch. Pr. 1777.

¹⁵ Pearse v. Brook, 3 Beav. 337; Daniell's Ch. Pr. 1777.

§ 273. ¹ Haff v. Spicer, 3 Caines (N. Y.), 190; Jackson *ex dem.* Kenyon v. Virgil, 3 J.R. (N. Y.) 540; Soule v. Chase,

had to be on the left side of the page;² but in this country it is usually at the right. In one case where a marksman had signed with his name at length, his hand having been guided for that purpose, the affidavit was ordered taken off the file.³ The jurat, which is indispensable, is placed upon the opposite side from the signature. It is usually in substantially the following form: "Sworn to before me this day of , 18 ." If the affiant be blind or a marksman, the jurat should be in substance thus: "Sworn, &c., the whole of the above affidavit having been first read over and explained to the said A. B., who appeared perfectly to understand the same, he made his mark in my presence."⁴ If the affiant have been previously found by the inquisition of a jury to be an idiot, a lunatic, or imbecile, the officer before whom the affidavit is sworn should state in the jurat that he has examined the deponent for the purpose of ascertaining the state of his mind, and that the latter was apparently of sound mind and capable of understanding the nature and contents of the affidavit.⁵ The omission of the addition to the officer's signature of his title,⁶ and even the omission of his signature, will not, it seems, be a fatal defect.⁷ It is usual and more prudent, even if not absolutely essential, for the officer to mark with his initials all interlineations and erasures in the body of the affidavit.⁸

§ 274. **Competency of Witnesses.** — The testimony of witnesses may be taken either solely for use in the court taking the same, or for use in other courts as well. The same rules as to competency prevail at law and in equity.¹ The Revised Statutes provide that, "in the courts of the United States, no witness shall be excluded in any action on account of color, or in any civil action because he is a party or interested in the issue tried: *provided*, that in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator,

1 Robertson (N. Y.), 222. But see Laimbeer v. Allen, 2 Sand. (N. Y.) 648.

2 Daniell's Ch. Pr. (2d Am. ed.) 1778.

3 — v. Christopher, 11 Simons, 409.

4 Daniell's Ch. Pr. (2d Am. ed.) 1776; Matter of Christie, 5 Paige (N. Y.), 242.

5 Matter of Christie, 5 Paige (N. Y.), 242.

6 Hunter v. Le Conte, 6 Cowen (N. Y.),

728; People v. Rensselaer Common Pleas, 6 Wend. (N. Y.) 543.

7 Chase v. Edwards, 2 Wend. (N. Y.) 283.

8 Daniell's Ch. Pr. (2d Am. ed.) 1777; Didier v. Warner, 1 Code R. (N. Y.) 42.

§ 274. ¹ Nash, tenant of Connett v. Williams, 20 Wall. 226.

intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court. In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty.”² This statute has been said to be remedial, and to deserve, therefore, a liberal construction.³ It applies as well to causes to which the United States is a party, as to those between private persons.⁴ It allows a party to testify in his own behalf, as well as when called upon by the other.⁵ It does not prevent a person, not a party but interested in the result of a suit, from testifying against an executor in a case when, if a party, he could not do so although the State law would exclude such testimony.⁶ Where an administratrix had commenced a suit and subsequently resigned, and the suit was continued by her successor, it was held that she who began the suit was a competent witness as to transactions with the testator.⁷ This statute does not allow a wife to testify in behalf of, or against, her husband, unless the laws of the State permit her so to do.⁸ For her incompetency by the common law was due not to interest, but to grounds of public policy.⁹ The cases where the court will require a party to testify, when otherwise he would not be obliged or allowed so to do, are rare. The court will usually only do so upon its own motion, and, if upon his suggestion, only after hearing the other party, if the latter object.¹⁰ The court will do so, however, when a party has died after his testimony has been taken and before trial, and his administrator insists upon reading or submitting his testimony at the hearing.¹¹ The court, will, it seems, not require such testimony to be taken, if by so doing it would adopt a rule of decision for a Federal court different from that prescribed by the legislature for courts of the State wherein it is held.¹² If there are several defendants, one of whom has a similar interest in the result to that of the

² U. S. R. S. § 858; *James v. Atlantic Delaine Co.*, 3 Cliff. 614. See *infra*, § 372.

³ *Texas v. Chiles*, 21 Wall. 488.

⁴ *Green v. United States*, 9 Wall. 655. *Contra*, *Jones v. United States*, 1 Ct. Cl. 355.

⁵ *Texas v. Chiles*, 21 Wall. 488; *Railroad Co. v. Pollard*, 22 Wall. 341.

⁶ *Stevens v. Bernays*, 42 Fed. R. 488; *Potter v. Third National Bank of Chic.*, 102 U. S. 163.

⁷ *Snyder v. Fiedler*, 139 U. S. 478.

⁸ *Lucas v. Brooks*, 18 Wall. 436.

⁹ *Lucas v. Brooks*, 18 Wall. 436.

¹⁰ *Eslava v. Mazange*, 1 Woods, 623.

¹¹ *Mumm v. Owens*, 2 Dill 475.

¹² *Robinson v. Mandell*, 3 Cliff. 169.

complainant, such defendant cannot, by requiring the complainant to testify, obviate the effect of the proviso in this statute.¹³ It seems that the admissions of a party are competent evidence against him, even though, upon his cross-examination, when testifying in his own behalf, he was not asked if he made them.¹⁴ In the Federal courts, no matter what the decisions of the State courts may be, a verbal collateral agreement cannot be proven to vary, qualify, contradict, add to, or subtract from the absolute terms of a written instrument, in the absence of fraud, accident, or mistake,¹⁵ nor to show by parol that payment was to be made in some other way than that specified in the written instrument.¹⁶ It has been held, in actions at common law, that the testimony of a physician as to information acquired while attending a patient in a professional capacity, when forbidden by the statutes of the State, should not be admitted in the Federal court there held;¹⁷ that when a State statute authorized the admissibility in evidence of a notarial certificate of a form inadmissible at common law,¹⁸ or of the endorsement of negotiable paper without proof of handwriting,¹⁹ the Federal court there held should follow such statutes; but that a State statute excluding the testimony of a witness on account of his interest in the controversy should be disregarded.²⁰ An application to the patent office and correspondence with the patent office, although the rules of the patent office provide that they shall be kept secret, must be produced by a party who has been served with a subpoena *duces tecum* calling for them, although a privilege is claimed upon the ground that they are the result of consultations between the applicant and his counsel, that their phraseology must necessarily reflect both the information given by the client to the counsel and the advice given by the counsel to the client, and that they have been placed in the hands of counsel under the protection of a confidential relation.²¹ By statute, on the trial of all indictments, informa-

¹³ *Eslava v. Mazange*, 1 Woods, 623.

¹⁴ *The Stranger*, 1 Brown's Adm. 281.

¹⁵ *Brown v. Spofford*, 95 U. S. 474; *American Electric Const. Co. v. Consumers' Gas Co.*, 47 Fed. R. 43, 46.

¹⁶ *Richardson v. Hardwick*, 106 U. S. 252; *Bast v. First National Bank of Ashland*, 101 U. S. 93.

¹⁷ *Conn. Mutual Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250.

¹⁸ *Sims v. Hundley*, 6 How. 1.

¹⁹ *M'Niel v. Holbrook*, 12 Pet. 84.

²⁰ *Potter v. National Bank*, 102 U. S. 163; *Goodwin v. Fox*, 129 U. S. 601, 631.

²¹ *Edison Electric Light Co. v. U. S. Electric Lighting Co.*, 44 Fed. R. 294, 297, 299.

tions, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness.²² It has been held that this does not render competent a defendant who by a previous conviction of an infamous crime had lost the privilege of testifying.²³ The Revised Statutes provide that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; provided that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."²⁴ Some authorities hold that since this statute a witness cannot object to testifying on the ground that an answer would tend to criminate him.²⁵ Such cases seem to give a very narrow construction to the Fourth Amendment to the Constitution. "The only protection to the party being that his answer shall not be used against him in a criminal prosecution,—a protection of little avail to any party who should disclose criminal acts upon which an indictment could be found, and should upon compulsion indicate other sources of evidence by means of which the acts disclosed can be proved; and such acts may also constitute offences under the law of the State, against which Congress can afford no immunity."²⁶ The Revised Statutes further provide that: "No testimony given by a witness before either House, or before any committee of either House of Congress, shall be

²² 20 St. at L. 30 (1 U. S. Supp. 312).

²³ *United States v. Hollis*, 43 Fed. R. 248.

²⁴ U. S. R. S. § 860.

²⁵ *United States v. McCarthy*, 18 Fed. R. 87; *People v. Kelly*, 24 N. Y. 74; *United States v. Brown*, 1 Saw. 531, 536; *United States v. Williams*, 15 Int. Rev. Rec. 199; *In re Phillips*, 2 American Law Times, 151; *In re Counselman*, 44 Fed. R. 268.

²⁶ *In re Pacific Railway Commission*, 32 Fed. R. 241, 267; *per Sawyer, J.* In *Matter of Palliser*, U. S. D. C., D. Conn. Nov. 1889, argued by George C. Sill, U. S. attorney, for the government, and Roger Foster for the witness; Judge Shipman refused to follow the cases cited in note 25, and allowed the witness to refuse to answer a question which he claimed would tend to criminate him. No opinion was written.

used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege.”²⁷ “No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.”²⁸ A defendant when called by the complainant as a witness may be compelled to state whether he has in his possession a machine claimed to be an infringement of the plaintiff’s patent, although the plaintiff has not previously made out a *prima facie* case of infringement.²⁹ The rules regulating the production of documents by a subpoena *duces tecum* or otherwise have been previously explained.³⁰

§ 275. *Subpœnas ad Testificandum*. — The attendance of a witness is usually compelled in equity as in law by the service of a subpoena *ad testificandum*, and the payment of his fees and mileage.¹ A subpoena *ad testificandum* is substantially in the same form in equity as in law. When issued from a court of the United States, it must be under the seal of the court, and signed by the clerk; and is usually also signed by the solicitors of the party at whose request it issues. Those issued from the Supreme Court or a Circuit Court must bear *teste* from the day of such issue of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence.² Those issuing from a District Court must bear *teste* of the judge, or when that office is vacant, of the clerk thereof.³ By the common law, the names of but four witnesses could be included in one subpoena.⁴ The Revised Statutes, however, provide that, “to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit.”⁵ If

²⁷ U. S. R. S. § 859.

²⁸ U. S. R. S. § 103.

²⁹ *Delamater v. Reinhardt*, 43 Fed. R. 76; U. S. C. C., S. D. N. Y. *per* Lacombe, J. *Contra*, *Celluloid Co. v. Crane Co.*, 3d Circuit.

³⁰ *Supra*, § 267.

§ 275. ¹ For the amount of his fees and mileage, see § 333.

² U. S. R. S. §§ 911, 912.

³ U. S. R. S. §§ 911, 912.

⁴ *Erwin v. United States*, 37 Fed. R. 470, 490.

⁵ U. S. R. S. § 829. *Erwin v. United States*, 37 Fed. R. 470, 490.

the witness can be served within the jurisdiction of the court where the suit is pending, or within a hundred miles of the place of holding that court, the subpoena may be issued from its clerk's office.⁶ If he cannot, and it is desired to take his testimony *de bene esse* under the acts of Congress,⁷ application for the issue of the subpoena must be made to the court of the district in which the examination is to be made.⁸ It has been held that Congress has no power to authorize or compel the courts of the United States to issue subpoenas or punish for contempt witnesses before a Congressional Commission,⁹ or an executive officer.¹⁰ "Witnesses who are required to attend any term of a circuit or district court on the part of the United States, shall be subpoenaed to attend to testify generally on their behalf, and not to depart the court without leave thereof, or of the district attorney; and under such process they shall appear before the grand or petit jury, or both, as they may be required by the court or district attorney."¹¹ It has been held that a witness cannot be compelled by subpoena to produce the patterns of the castings of a stove, which are in his possession.¹²

§ 276. **Service of a Subpoena ad testificandum.** — A subpoena to appear and testify may be served by the marshal of the court, or by any other person acting as the agent of the party calling the witness.¹ The Revised Statutes provide that "subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district; *provided*, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same."² A witness' attendance at a court more than one hundred miles from the place where he lives cannot be compelled by the service of a subpoena upon him within the district, when he has been enticed there by

⁶ U. S. R. S. § 876.

⁷ See *infra*, §§ 286-287.

⁸ U. S. R. S. § 863, *United States v. Tilden*, 25 Internal Rev. R. 352; *Ex parte Humphrey*, 2 Blatchf. 228; *Henry v. Ricketts*, 1 Cranch C. C. 580; *Ex parte Elisha Peck*, 3 Blatchf. 113. See *infra*, § 276.

⁹ *In re Pacific Railway Comm'n*, 32 Fed. R. 241. But see *In re Counselman*, 44 Fed. R. 268.

¹⁰ *In re McLean*, 37 Fed. R. 618.

¹¹ U. S. R. S. § 877.

¹² *In re Shephard*, 3 Fed. R. 12.

§ 276. ¹ *Schwabacker v. Reilly*, 2 Dill. 127; *Cummings v. The Akron Cement & Plaster Co.*, 6 Blatchf. 509; *Miller v. Scott*, 6 Phila. (Pa.) 484; *Power v. Semmes*, 1 Cranch C. C. 247.

² U. S. R. S. § 876; *Ex parte Beebees*, 2 Wall. Jr. 127; *Henry v. Ricketts*, 1 Cranch C. C. 580; *United States v. Williams*, 4 Cranch C. C. 372.

false pretences;³ or while there to attend either as a party, a witness, an attorney, or a counsel during a suit or other judicial proceeding in a State⁴ or Federal court;⁵ or, while travelling upon his way to or from Congress, if he be a member thereof;⁶ or if there in the course of the performance of any public duty.⁷

“When a commission has been issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or Territory, the clerk of any court of the United States for such district or Territory shall, on the application of either party to the suit, or of his agent, issue a subpoena for such witness, commanding him to appear and testify before the commissioner named in the commission, at any time and place stated in the subpoena; and if any witness, after being duly served with such subpoena, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpoena, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpoena to testify issued by such court.”⁸

“When either party in such suit applies to any judge of a United States court in such district or Territory for a subpoena commanding the witness, therein to be named, to appear and testify before said commissioner, at the time and place to be stated in the subpoena, and to bring with him and produce to such commissioner any paper or writing or written instrument or book or other document supposed to be in the possession or power of such witness, and to be described in the subpoena, such judge, on being satisfied, by the affidavit of the person applying, or otherwise, that there is reason to believe that such paper, writing, written instrument, book, or other document is in the possession or power of the witness, and that the same, if produced, would be competent and material evidence for the party

³ *Union Sugar Refinery Co. v. Mathieson*, 2 Cliff. 304; *Steiger v. Bonn*, 4 Fed. R. 17.

⁴ *Juneau Bank v. M'Speda*, 5 Biss. 64; *Matthews v. Tufts*, 87 N. Y. 568. But see *Blight v. Fisher*, Pet. C. C. 41.

⁵ *Parker v. Hotchkiss*, 1 Wall. Jr. 269 ;

Matthews v. Tufts, 87 N. Y. 568. *Contra*, *Blight v. Fisher*, *Peters' Circuit Court Reports*, 41.

⁶ Constitution Art. I. § 6; *Miner v. Markham*, 28 Fed. R. 387.

⁷ See § 98.

⁸ U. S. R. S. § 868.

applying therefor, may order the clerk of said court to issue such subpœna accordingly. And if the witness, after being served with such subpœna, fails to produce to the commissioner, at the time and place stated in the subpœna, any such paper, writing, written instrument, book, or other document, being in his possession or power, and described in the subpœna, and such failure is proved to the satisfaction of said judge, he may proceed to enforce obedience to said process of subpœna, or punish the disobedience, in like manner as any court of the United States may proceed in case of disobedience to like process issued by such court. When any such paper, writing, written instrument, book, or other document is produced to such commissioner, he shall, at the cost of the party requiring the same, cause to be made a correct copy thereof, or of so much thereof as shall be required by either of the parties.”⁹

“No witness shall be required, under the provisions of either of the two preceding sections, to attend at any place out of the county where he resides, nor more than forty miles from the place of his residence, to give his deposition; nor shall any witness be deemed guilty of contempt for disobeying any subpœna directed to him by virtue of either of the said sections, unless his fee for going to, returning from, and one day’s attendance at the place of examination are paid or tendered to him at the time of the service of the subpœna.”¹⁰

§ 276 a. **Depositions in the District of Columbia for use in Suits pending elsewhere.** The Revised Statutes provide that, “When a commission to take the testimony of any witness found within the District of Columbia, to be used in a suit depending in any State or Territorial or foreign court, is issued from such court, or a notice to the same effect is given according to its rules of practice, and such commission or notice is produced to a justice of the Supreme Court of said District, and due proof is made to him that the testimony of such witness is material to the party desiring the same, the said justice shall issue a summons to the witness, requiring him to appear before the commissioners named in the commission or notice, to testify in such suit, at a time and at a place within said District therein specified.”¹

“When it satisfactorily appears by affidavit to any justice of

⁹ U. S. R. S. § 869.

§ 276 a. ¹ U. S. R. S. § 871.

¹⁰ U. S. R. S. § 870.

the Supreme Court of the District of Columbia, or to any commissioner for taking depositions appointed by said court: first, that any person within said District is a material witness for either party in a suit pending in any State or Territorial or foreign court; second, that no commission nor notice to take the testimony of such witness has been issued or given; and, third, that, according to the practice of the court in which the suit is pending, the deposition of a witness taken without the presence and consent of both parties will be received on the trial or hearing thereof, — such officer shall issue his summons, requiring the witness to appear before him at a place within the District, at some reasonable time, to be stated therein, to testify in such suit.”²

“Testimony obtained under the two preceding sections shall be taken down in writing by the officer before whom the witness appears, and shall be certified and transmitted by him to the court in which the suit is pending, in such manner as the practice of that court may require. If any person refuses or neglects to appear at the time and place mentioned in the summons, or, on his appearance, refuses to testify, he shall be liable to the same penalties as would be incurred for a like offense on the trial of a suit.”³

“Every witness appearing and testifying under the said provisions relating to the District of Columbia shall be entitled to receive for each day’s attendance, from the party at whose instance he is summoned, the fees now provided by law for each day he shall give attendance.”⁴

The courts of the United States have no power to compel the attendance of persons to an examination in a foreign country. Such testimony, therefore, can only be taken against the will of a witness by the aid of, and by means of, the remedies administered by a foreign court.⁵

§ 277. Compelling a Witness to testify. — When a witness, who has been properly served with a subpœna, refuses to attend, or when upon his examination he refuses to answer a relevant and proper question, against answering which he is not protected by his privilege, by the old rules he was liable “to be proceeded against in three ways: first, by attachment for a contempt of

² U. S. R. S. § 872.

⁴ U. S. R. S. § 874.

³ U. S. R. S. § 873.

⁵ § 290.

the process of the court; secondly, by a special action on the case for damages at common law; and thirdly, by action on the statute 5 Eliz. c. 9, § 12, for the further recompense given by that statute, if it has been previously assessed by the court out of which the process issued.”¹ In the Federal courts, a witness, if contumacious, may be punished for contempt,² and is also probably liable to an action for the damages sustained by his refusal. Upon an application to punish a witness for refusing to answer a question, the power of the officer before whom he is examined and the materiality of the question may both be considered.³ Such an application must be made to the court which issued the subpoena.⁴ When an application to punish a witness for contempt for failure to produce a paper in obedience to a subpoena *duces tecum*, it has been said that the materiality of the paper required will not be determined unless it is produced;⁵ and if there is color for the claim that the paper is material, its production will be compelled, and the decision as to the admission of the paper in evidence postponed to the final hearing.⁶ The rules concerning the privileges of witnesses and the materiality and relevancy of evidence are substantially the same in equity as at law.⁷ Care will be taken not to compel a witness to needlessly disclose his business secrets⁸ and private papers.⁹

§ 278. **Testimony taken in Equity which may be used in other Courts.** — Testimony may be taken in a court of equity for use in other courts, as well as for its own use, by bills to perpetuate testimony¹ and bills to take testimony *de bene esse*;² and formerly, at least, testimony could be taken in a court of equity for use in another court by a bill of discovery.³

§ 279. **Bills to perpetuate Testimony.** — “In any case where it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may, according

§ 277. ¹ Tidd's Pr. 738.

² U. S. R. S. § 725.

³ *Ex parte* Peck, 3 Blatchf. 113; *Ex parte* Judson, 3 Blatchf. 89.

⁴ *In re* Allis, 44 Fed. R. 216.

⁵ Edison El. L. Co. v. United States El. L. Co., 44 Fed. R. 294.

⁶ Edison El. L. Co. v. United States El. L. Co., 45 Fed. R. 55, 59.

⁷ *Stevens v. Cooper*, 1 J. Ch. (N. Y.) 425.

⁸ *Robinson v. Phila., &c. R. R. Co.*, 28 Fed. R. 340, 342.

⁹ *Henry v. Travelers' Ins. Co.*, 35 Fed. R. 15.

§ 278. ¹ § 279.

² § 280.

³ § 281.

to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matters that may be cognizable in any court of the United States.”¹ In order to obtain such a direction, the party wishing the testimony taken should file a bill to perpetuate testimony.² A bill to perpetuate testimony must contain all the facts necessary to give the court jurisdiction. It must state with reasonable certainty the subject-matter touching which the plaintiff is desirous of taking testimony,³ and show that it is a matter which may be cognizable in a court of the United States.⁴ It should also show that the plaintiff has some interest in the subject-matter, which may be endangered if the testimony in support of it is lost. A mere expectancy, however strong and well-founded, is not sufficient. It has been said, “Put the case as high as possible; that the party seeking to perpetuate the testimony is the next of kin of a lunatic; that the lunatic is intestate; that he is in the most helpless state, a moral and physical impossibility (though the law would not so regard it) that he should ever recover; even if he were *in articulo mortis*, and the bill was filed at that instant; still, the plaintiff could not qualify himself to maintain it, as having any interest in the subject of the suit.”⁵ If, however, the interest be such a one as may be immediately barred by the party against whom the bill is brought, it has been said that the court will withhold its assistance, for it would be a fruitless exercise of power.⁶ Such a bill must also show that the defendant has, or claims to have, a title or interest in opposition to that of the plaintiff in the subject-matter of the proposed testimony,⁷ as, for example, that the defendant claims an exclusive right to the use of a process which the plaintiff is using, and rests his claim upon letters-patent which the proposed testimony will show to be invalid;⁸ and some ground of necessity for perpetuating the evidence, as that the facts to which the testi-

§ 279. ¹ U. S. R. S. § 866. Testimony may thus be taken before a Circuit Court while a case is pending in the Supreme Court or Circuit Court of Appeals on appeal from a decree sustaining a demurrer. *Richter v. Union Trust Co.*, 115 U. S. 55.

² *New York & Baltimore Coffee Polishing Co. v. New York Coffee Polishing Co.*, 9 Fed. R. 578.

³ *Story's Eq. Pl.* §§ 300, 305.

⁴ U. S. R. S. § 868; *New York & Bal-*

timore Coffee Polishing Co. v. New York Coffee Polishing Co., 9 Fed. R. 578. But see *Morris v. Morris*, 2 Phill. 205, 208.

⁵ *Dursley v. Fitzhardinge*, 6 Ves. 260.

⁶ *Dursley v. Fitzhardinge*, 6 Ves. 261-263.

⁷ *Story's Eq. Pl.* § 302.

⁸ *New York & Baltimore Coffee Polishing Co. v. New York Coffee Polishing Co.* 9 Fed. R. 578.

mony of the witnesses proposed to be examined relate, cannot be immediately investigated in a court of law or equity, — or, if they can be immediately investigated, that the right to commence such a suit or action belongs exclusively to the defendant; or that the defendant has interposed some impediment, such as an injunction, to an immediate trial of the matter in a court of law; or that, before the investigation can take place, the evidence of a material witness is likely to be lost by his threatened death, illness, or departure from the jurisdiction of the court: ⁹ but the fact that, in the case recently cited, the attorney-general might institute a proceeding to annul a patent, will not prevent the granting of the prayer of the bill.¹⁰ The prayer should be for leave to examine the witnesses touching the matter stated, to the end that their testimony may be preserved and perpetuated, and for the proper process of subpoena.¹¹ It seems that if it adds thereto a prayer for other, or for general relief, it will be demurrable for that reason,¹² although the court may allow an amendment omitting that part of the prayer.¹³ An affidavit of the circumstances by which the evidence intended to be perpetuated is in danger of being lost, must be filed with the bill.¹⁴ Otherwise, the bill should conform substantially to the requirements of original bills praying relief. Such a bill, it has been held, cannot by amendment be converted into a bill of discovery.¹⁵ It is of itself a bill of discovery only to the extent of enabling the plaintiff to obtain the relief prayed for in it, and he can, therefore, only require an answer from the defendant as to the facts alleged in the bill as entitling him to examine the witnesses.¹⁶ An omission of any of the foregoing statements in, or requirements of, the bill will make it demurrable; and if any of the necessary allegations are false, or there is another objection not apparent upon the face of the bill, that may be taken by plea or answer.¹⁷ If the

⁹ *Angell v. Angell*, 1 Sim. & S. 83; *New York & Baltimore Coffee Polishing Co. v. New York Coffee Polishing Co.*, 9 Fed. R. 578; *Story's Eq. Pl. § 303*; *Daniel's Ch. Pr.* 1572, 1573.

¹⁰ *New York & Baltimore Coffee Polishing Co. v. New York Coffee Polishing Co.*, 9 Fed. R. 578.

¹¹ *Story's Eq. Pl. § 306*.

¹² *Rose v. Gannel*, 3 Atk. 439; *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316; *Story's*

Eq. Pl. § 306; *Dalton v. Thomson*, 1 Dickens, 97. But see Rule 21.

¹³ *Vaughan v. Fitzgerald*, 1 S. & L. 316.

¹⁴ *Earl of Suffolk v. Green*, 1 Atk. 450; *Philips v. Carew*, 1 P. Wms. 117; *Shirley v. Earl Ferrers*, 3 P. Wms. 77.

¹⁵ *Ellice v. Roupell*, 32 Beav. 299; s. c. 9 Jur. n. s. 530.

¹⁶ *Ellice v. Roupell*, 32 Beav. 308; s. c. 9 Jur. n. s. 533.

¹⁷ *Story's Eq. Pl. § 306 a.*

defendant answer denying the plaintiff's case, witnesses may be examined as to the point in issue by either party.¹⁸ Otherwise, such a bill should not be brought to a hearing, and if the plaintiff do so it will be dismissed with costs, but without prejudice to the use of the testimony taken in pursuance of its prayer.¹⁹ It is said that "If the plaintiff neglects to proceed with the suit, the defendant cannot move to dismiss for want of prosecution; but may move that the plaintiff be ordered to take the next step, within a limited time, or to pay him the costs of the suit. If the defendant neglects to take the steps proper to be taken by him within the prescribed time, the court will, it seems, order the examination of the witnesses to proceed."²⁰ If no valid objection is made, the court will order the testimony to be taken. Both parties may examine witnesses under the order;²¹ and either party must be allowed to cross-examine those whom his opponent examines in chief.²² After the witnesses have been examined, the cause is at an end,²³ and if the defendant have examined no witnesses in chief he will be entitled to his costs; but by receiving costs he waives any objection he might otherwise be entitled to make on the ground that he has had no sufficient opportunity of cross-examination.²⁴ The testimony thus taken is filed in the clerk's office, and can be used in a subsequent case at law or in equity in the same court, under an order, which must be obtained by motion upon notice, and supported by proof of the witness's death, or that he cannot be then compelled to attend and testify.²⁵

§ 280. *Bills to take Testimony de bene esse.* — Bills to take testimony *de bene esse* were formerly filed after a suit or action had been begun, in order to take the testimony of such witnesses as, on account of their age, infirmity, or intention to depart from the jurisdiction of the court, it was feared could not be taken in its

¹⁸ *Brigstocke v. Roch*, 7 Jur. N. S. 63.

¹⁹ *Hall v. Hoddesdon*, 2 P. Wms. 162; *Anon.*, *Ambler*, 237; s. c. 2 Ves. Sen. 497; *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316; *Morrison v. Arnold*, 19 Ves. 670; *Ellice v. Roupell*, 32 Beav. 308.

²⁰ *Daniell's Ch. Pr.* (5th Am. ed.) 1573; *Wright v. Tatham*, 2 Simons, 459; *Beavan v. Carpenter*, 11 Simons, 22; *Coveny v. Athill*, 1 Dickens, 355; *Lancaster v. Lancaster*, 6 Simons, 439.

²¹ *Sheward v. Sheward*, 2 V. & B. 116;

Earl of Abergavenny v. Powell, 1 Meriv. 434; *Skrine v. Powell*, 15 Simons, 81; s. c. 9 Jur. 1054.

²² *Daniell's Ch. Pr.* (5th Am. ed.) 1573, 1574.

²³ *Morrison v. Arnold*, 19 Ves. 670; *Vaughan v. Fitzgerald*, 1 Sch. & Lef. 316.

²⁴ *Watkins v. Atchison*, 10 Hare, Ap. xlv.

²⁵ *Daniell's Ch. Pr.* (5th Am. ed.) 1574, 1575.

regular method of proceeding.¹ Such bills must substantially comply with the rules regulating bills to perpetuate testimony, with which, indeed, they have been often confounded.² Now that the same relief can be afforded under the statutes both of most of the individual States and of the United States,³ it is rarely, if ever, that an occasion for their use arises.

§ 281. **Bills of Discovery.** — Every bill may seek discovery, but the kind of bill called a bill of discovery is a bill filed for the sole purpose of obtaining a discovery of facts resting in the defendant's knowledge, or of deeds, writings, or other things in his custody or power; and seeking no relief in consequence of the discovery, except possibly a stay of proceedings till the discovery is made.¹ A bill of discovery is usually, if not always, used in aid of the jurisdiction of another court.² It will not be allowed, if it seek a discovery of matters concerning which a party, if called as a witness, would be excused from testifying;³ nor, it has been said, if the discovery is sought in aid of an action for a mere personal tort.⁴ A bill of discovery can only be filed in aid of a judicial proceeding already commenced or immediately contemplated.⁵ If filed in aid of proceedings already begun, no person may be made a party to it who is not a party to such proceedings,⁶ except possibly the officer of a corporation.⁷ A bill of discovery must state the matter touching which discovery is sought, show that both the plaintiff and the defendant have or claim an interest therein, state the facts and circumstances upon which the plaintiff's right to compel discovery from the defendant is founded, and pray that the defendant may make a full discovery of the matters therein stated.⁸ A bill of discovery may also pray any equitable assistance of the court which is merely consequential upon the prayer for discovery;⁹ but if it should pray any other or general relief, it will thereby become a bill for

§ 280. ¹ Story's Eq. Pl. § 307.

² Story's Eq. Pl. § 307.

³ U. S. R. S. §§ 863-865, and Rule 70.

§ 281. ¹ Daniell's Ch. Pr. (5th Am. ed.) 1556.

² Daniell's Ch. Pr. (5th Am. ed.) 1556.

³ Glynn v. Houston, 1 Keen, 329;

Langdell's Eq. Pl. § 69; Wigram on Discovery, §§ 130-138; Daniell's Ch. Pr. (2d Am. ed.) 563-569.

⁴ Glynn v. Houston, 1 Keen, 329.

⁵ Mayor of London v. Levy, 8 Ves. 398; United N. J. Railroad & C. Company v. Hoppock, 1 Stewart's Eq. (N. J.) 261; Daniell's Ch. Pr. 1558.

⁶ Queen of Portugal v. Glyn, 7 Cl. & F. 466; Daniell's Ch. Pr. (5th Am. ed.) 1558.

⁷ See § 43.

⁸ Daniell's Ch. Pr. (5th Am. ed.) 1557.

⁹ Mitford's Eq. Pl. ch. i. § 3; Loker v. Roll, 3 Ves. 4.

relief.¹⁰ It seems that a bill of discovery need not allege that the facts of which a discovery is sought are within the exclusive knowledge of the defendant;¹¹ but they must be matters essential to a plaintiff's cause of action, or if he be defendant in another suit or action, to his affirmative defense, and the bill must not seek discovery of the evidence of a part of what belongs solely to the defendant's case.¹² The defendant may oppose a bill of discovery by a demurrer, or plea, or in his answer, in the same manner as he might oppose a bill for relief. The English rule, as finally established, was that, if a demurrer were interposed to a bill praying both discovery and relief, and the bill were held not to show a proper case for relief, it could not be maintained for discovery merely.¹³ The rule in the Federal courts is uncertain.¹⁴ A defense founded upon the statute of limitations or laches may be interposed to a bill of discovery by plea,¹⁵ or, if it appear upon the face of the bill, by demurrer.¹⁶ A material amendment of a bill of discovery will very rarely be allowed.¹⁷ A bill of discovery is never brought to a hearing; but, after the defendant has put in a full answer thereto, he is entitled to costs of the suit,¹⁸ less any costs allowed the plaintiff upon exceptions to a previous answer as insufficient.¹⁹ It has been held in the district of Wisconsin that a bill of discovery cannot be maintained in a Circuit Court of the United States held within a State under whose statutes a party can be compelled to testify.²⁰

¹⁰ *Angell v. Westcombe*, 6 Simons, 30.

¹¹ *Metler v. Metler*, 4 C. E. Green (19 N. J. Eq.), 457.

¹² *Wigram on Discovery*, § 372; *Langdell's Eq. Pl.* § 172; *Ingilby v. Shafto*, 33 Beav. 31.

¹³ *Fry v. Penn*, 2 Bro. C. C. 280; *Loker v. Rolle*, 3 Ves. 4; *Langdell's Eq. Pl.* § 152.

¹⁴ Compare *Livingston v. Story*, 9 Pet. 632; *Wright v. Dame*, 1 Met. (Mass.) 237; *Hinginbotham v. Burnet*, 5 J. Ch. (N.Y.) 184; *Story's Eq. Pl.* § 412, with *Markey v. Mutual Benefit Life Ins. Co.*, 6 Ins. L. J. 537.

¹⁵ *Beames on Pleas*, 275; *Gait v. Osbaldeston*, 1 Russ. 158.

¹⁶ *Wooster v. Sidenbergh*, U. S. C. C., S. D. N. Y. Nov. 6, 1889.

¹⁷ *Marquis Cholmondeley v. Lord Clinton*, 2 Meriv. 71.

¹⁸ *Attorney-General v. Burch*, 4 Madd. 178.

¹⁹ *Hughes v. Clerk*, 6 Hare, 195. See also *Bryant v. Leland*, 6 Fed. R. 125 U. S. C. C., D. Mass.; *Easton v. Hodges*, 7 Bissell 324; U. S. C. C., D. Illinois; *Paton v. Majors*, 46 Fed. R. 210, U. S. C. C., E. D. La.; *Billings J.*; *Washburn & M. Manuf. Co. v. Freeman Wire Co.*, 41 Fed. R. 410; U. S. C. C., E. D. Mo.; *Thayer, J.*; *Washburn & M. Manuf. Co. v. Cincinnati Barb Wire Fence Co.*, 42 Fed. R. 675, U. S. C. C., S. D. Ohio.

²⁰ *Rindskopf v. Platto*, 29 Fed. R. 130. See also *Heath v. Erie R.R. Co.*, 9 Blatchf. 316; *Brown v. Swann*, 10 Pet. 497; *Manchester Fire Assur. Co. v. Stockton, C. H. & A. Works*, 38 Fed. R. 378.

In the Southern District of New York a contrary ruling sustaining such a bill was made.²¹

§ 282. **Testimony taken before a Cause is at Issue.** — Testimony for use in a court of law or equity of the United States may be taken either before or after it is at issue. Testimony taken before a cause is at issue may be taken either before or after it has been begun. "Any court of the United States may, in its discretion, admit in evidence in any cause before it any deposition taken in *perpetuam rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending, according to the laws thereof."¹ Evidence taken by means of a bill to perpetuate testimony may also be admitted in a subsequent suit in equity.² "After any bill filed and before the defendant hath answered the same, upon affidavit made, that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony."³ Such testimony is then taken in the same manner as testimony taken after issue has been joined.

§ 283. **Testimony taken after a Cause is at Issue within the Jurisdiction of the Court.** — Testimony taken after a cause is at issue is taken differently when taken within than when taken without the jurisdiction of the court. Originally, the only manner of examining witnesses within the jurisdiction of a court of chancery was by means of written interrogatories and cross-interrogatories, which were prepared by the solicitors and counsel of the respective parties, or by the court, and then submitted to an examiner or one or more commissioners appointed by the court, who examined the witnesses privately by means of them. The testimony thus obtained was kept secret until all the testimony in the cause had been taken. The time when it would first be inspected was called the time of publication.¹ In the courts of

²¹ *Colgate v. Compagnie Française*, 23 Fed. R. 82. See also *Paine v. Warren*, 33 Fed. R. 357.

§ 282. ¹ U. S. R. S. § 867.

² *New York & Baltimore Coffee Polish-*

ing Co. v. New York Coffee Polishing Co., 9 Fed. R. 578.

³ Rule 70. See *Eslava v. Mazange*, 1 Woods, 623.

§ 283. ¹ *Langdell's Equity Pleading*,

the United States it seems that originally the only method of examination in equity was by commissioners. It was regulated by the following rules:—

“After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk’s office, ten days’ notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time, the commission may issue *ex parte*. In all cases, the commissioner or commissioners shall be named by the court, or by a judge thereof. If the parties shall so agree, the testimony may be taken upon oral interrogatories by the parties or their agents, without filing any written interrogatories.”² In 1854 it was “ordered, that the sixty-seventh rule governing equity practice be so amended as to allow the presiding judge of any court exercising jurisdiction, either in term time or in vacation, to vest in the clerk of said court general power to name commissioners to take testimony in like manner that the court or judge thereof can now do by the said sixty-seventh rule.”³ “Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk’s office, publication thereof may be ordered in the clerk’s office, by any judge of the court, upon due notice to the parties, or it may be enlarged as he may deem reasonable under the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk’s office, such consent being in writing, and a copy thereof entered in the order-books, or endorsed upon the deposition or testimony.”⁴ Where there is a dispute as to the relevancy of an interrogatory or cross-interrogatory, the usual practice is to allow it to be answered in a doubtful case, and

§§ 56–58. See *Elliott v. Craps*, 44 Fed. R. 792; *Wood v. Mann*, 2 Sumner, 316.

³ Amendment of 1854 to Rule 67.

⁴ Rule 69; *Elliott v. Craps*, 44 Fed. R.

² Rule 67. In 1861 the last paragraph of this rule was repealed.

to determine the objections to it at the hearing or by a motion to suppress the deposition.⁵ The court may refer the interrogatories to a master to inquire into their relevancy.⁶ It has been said, that, as a general rule, after the publication of testimony, no more can be taken unless the judge himself, upon or after the hearing, entertains a doubt, or the proof of some additional fact is indispensable to enable him to make a satisfactory decree; but that exhibits in a cause may be proved after publication, and even *viva voce* at the hearing, when they have not been proved in due season; and that a witness may be examined after publication as to the credit of other witnesses; and that the time may be enlarged after publication is passed, but not in fact made according to rules of court, upon good cause, as surprise, accident, or some other circumstances repelling imputations of laches, proved by affidavit, which, unless the other party has practised fraud, is indispensable.⁷ This method of taking testimony was, like many other parts of equity practice, borrowed from the canon law; with this difference, however, that whereas by the canon law each party before the examination of witnesses was obliged to furnish his adversary and the court with articles containing a specific statement of the facts which he expected to prove by them; in equity, on the other hand, except in a few rare instances, facts, not evidence, are required to be pleaded. So, originally, each party was before publication very much in the dark as to the facts which his antagonist intended to attempt to establish. "It is not surprising, therefore, that the mode of taking testimony in equity fell into disrepute, and finally broke down."⁸

§ 284. **Present Method of taking Testimony within the Jurisdiction.** — Testimony in equity is now, therefore, almost universally allowed to be taken orally in the presence of counsel. The rules regulating the practice of the courts of the United States upon the subject are as follows: "Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or

⁵ *Zunkel v. Litchfield*, 21 Fed. R. 196, 197; *Giles v. Paxson*, 36 Fed. R. 882; *Appleton v. Ecaubert*, 45 Fed. R. 281; *Edison El. L. Co. v. U. S. El. L. Co.* 44 Fed. R. 294, s. c. 45 Fed. R. 55; *Blease v. Garlington*, 92 U. S. 1; *infra*, § 284, note 17.

⁶ *Zunkel v. Litchfield*, 21 Fed. R. 196.

⁷ *Wood v. Mann*, 2 Sumner, 316.

⁸ *Langdell's Eq. Pl.* § 56. See also *Langdell's Eq. Pl.* §§ 14-19.

before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill and answer, if any; and such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in the common-law courts. The depositions taken upon such oral examinations shall be taken down in writing by the examiner in the form of a narrative, unless he determines the examination shall be by question and answer in special instances; in which instances it shall be taken down by a stenographer and be put into typewriting or other writing, and, when completed, shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witness shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner may, upon all examinations, state any special matter to the court as he shall see fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.”¹

“The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing, shall be paid in the first instance by the party who makes the examination or the cross-examination, as the case may be, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge shall ultimately bear them.”¹

“In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practised with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories. Notice shall be given by the respective counsel or solicitors, to the opposite counsel or solicitors, or parties, of the time and place of the examination, for

§ 284. ¹ Amendments of 1861 and 1891 to Rule 67. For an instructive case as to the regularity of proceedings before an examiner, see *Fisher v. Hayes*, 6 Fed. R. 86. Interrogatories may be referred to a master for an inquiry into their relevancy. *Zunkel v. Litchfield*, 21 Fed. R. 196.

such reasonable time as the examiner may fix by order in each cause. When the examination of witnesses before the examiner is concluded, the original deposition, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in the thirtieth section of Act of Congress, September 24, 1789.² Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons satisfactory to the court or judge.”³ “Where the evidence to be adduced in a cause is to be taken orally, as provided in the order passed at the December term, 1861, amending the 67th General Rule, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties, or by leave of the court first obtained, on motion, for cause shown.”⁴ “Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence upon the hearing.”⁵ Except in a very flagrant case, the appellate court will not, upon appeal, review the action of the lower court in giving or refusing further time in which to take testimony.⁶

In the Circuit Court of the United States for the Southern District of New York, the following rules regulate the subject: “If a general commission is not issued, pursuant to the 25th Rule of the Supreme Court, within ten days after replication filed, either party may give notice of the examination of witnesses before the standing examiner of this court; and three months from the time of the replication shall be allowed the parties for taking

² U. S. R. S. § 865. See *infra*, §§ 286, 548; *Wooster v. Clark*, 9 Fed. R. 851. 287.

³ Amendment of 1861 to Rule 67.

⁴ Amendment of 1869 to Rule 67.

⁵ Rule 69. See *Coon v. Abbott*, 37 Fed. R. 98; *Streat v. Steinam*, 38 Fed. R.

After the time has expired, the court may permit the testimony to be taken *nunc pro tunc*. *Coon v. Abbott*, 37 Fed. R. 98.

⁶ *Ingle v. Jones*, 9 Wall. 486; *Grant v. Phoenix Mut. Life Ins. Co.* 121 U. S. 105.

their depositions before the examiner.”⁷ “In taking testimony, all Masters, Examiners, Referees, and Commissioners shall, where testimony is written down by question and answer, number the questions put to each witness continuously, from the commencement of his direct examination to the final close of his examination, direct and cross.”⁸ “Whenever it is intended to offer oral proof in open court, the party proposing it shall give due notice to the opposite party of the names of the witnesses, the matters to which they are to be examined, and of the reasons upon which he will move for an examination.”⁹ “A master or examiner, in taking proofs, or in matters of reference, shall not, without the written consent of all parties, or the authorization of one of the judges, adjourn proceedings pending before him, for a longer time than ten days.”¹⁰ “No rule or order need be entered for the publication of testimony; but so soon as the commissioner or examiner shall have completed the testimony offered, the party taking it shall cause the deposition to be filed in the clerk’s office, and forthwith give notice thereof to the adverse party. Either party may thereupon enter a rule of course, that the clerk open the commission, or deposition, and file the same.”¹¹ “Within four days after the clerk shall have prepared copies of the depositions (provided the same were applied for in two days after the notice of the filing thereof), the adverse party may give notice of exception, before a judge at chambers, to the proofs or any part of them, on account of any irregularity in taking the depositions, or executing the commissions; and, if no such notice of exception is given, all objections to the form or manner in which the proofs were taken, shall be deemed waived.”¹² Testimony cannot thus be taken outside the district where the suit is pending,¹³ except possibly when a special examiner is appointed for that purpose.¹⁴

“Whenever it is intended to offer oral proof in open court, the party proposing it shall give due notice to the opposite party of the names of the witnesses, the matters to which they are to be examined, and of the reasons upon which he will move for an

⁷ U. S. C. C., S. D. N. Y. Rule 108.

¹² U. S. C. C., S. D. N. Y. Rule 113.

⁸ U. S. C. C., S. D. N. Y. Rule of Nov. 10, 1868.

¹³ Celluloid Manuf. Co. v. Russell, 35 Fed. R. 17.

⁹ U. S. C. C., S. D. N. Y. Rule 110.

¹⁴ Railroad Co. v. Drew, 3 Woods, 697.

¹⁰ U. S. C. C., S. D. N. Y. Rule 115.

Contra, Arnold v. Cheseborough, 35 Fed.

¹¹ U. S. C. C., S. D. N. Y. Rule 112.

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examination.”¹⁵ The examiner must note all objections and exceptions to questions and answers, and take the testimony subject to them, but cannot decide on their validity.¹⁶ It has been held that the court will not interfere to prevent irrelevant questions.¹⁷ Whether the judge can in his discretion permit

¹⁵ U. S. C. C., S. D. N. Y. Rule 110.

¹⁶ Appleton v. Ecaubert, 45 Fed. R. 281.

¹⁷ Blease v. Garlington, 92 U. S. 1, 4-8; per Waite, C. J. :—

“The Judiciary Act of 1789 (1 Stat. at L. 88, sect. 30) provided that the mode of proof by oral testimony and examination of witnesses in open court should be the same in all the courts of the United States, as well in the trial of causes in equity as of actions at common law. By sect. 19 of the same act, it was made the duty of the Circuit Court, in equity cases, to cause the facts on which they founded their decree fully to appear upon the record, either from the pleadings and decree, or a statement of the case agreed upon by the parties or their counsel, or, if they disagreed, by a stating of the case by the court. Subsequently, in 1802 (2 Stat. at L. 166, sect. 25), it was enacted that in all suits in equity the court might in its discretion, upon the request of either party, order the testimony of witnesses therein to be taken by depositions. In 1803 (2 Stat. at L. 244, sect. 2) an appeal was given to this court in equity cases, and it was provided, that, upon the appeal, a transcript of the bill, answer, depositions, and all other proceedings in the cause, should be transmitted here. The case was to be heard in this court upon the proofs submitted below. In *Conn. v. Penn.*, 5 Wheat. 424, decided in 1820, this court held that a decree founded in part upon parol testimony must be reversed, because that portion of the testimony which was oral had not been sent up. For this reason, among others, the cause was sent back for further proceedings according to equity. Chief-Justice Marshall, in delivering the opinion of the court, said (p. 426) :—

“‘Previous to this act (that of 1803), the facts were brought before this court by the statement of the judge. The depositions are substituted for that statement;

and it would seem, since this court must judge of the fact as well as the law, that all the testimony which was before the Circuit Court ought to be laid before this court. Yet the section (of the act of 1789) which directs that witnesses shall be examined in open court is not, in terms, repealed. The court has felt considerable doubt on this subject, but thinks it the safe course to require that all the testimony on which the judge founds his opinion should, in cases within the jurisdiction of this court, appear in the record.’ Under the authority of the act of May 8, 1792 (1 Stat. at L. 276, sect. 2), this court at its February Term, 1822, adopted certain rules of practice for the courts of equity of the United States. 7 Wheat. Rules 25, 26, and 28 related to the taking of testimony by depositions, and the examination of witnesses before a master or examiner; but by Rule 28 it was expressly provided that nothing therein contained should ‘prevent the examination of witnesses *viva voce* when produced in open court.’ These rules continued in force until the January Term, 1842, when they were superseded by others then promulgated, of which 67, 68, 69, and 78 related to the mode of taking testimony, but made no reference to the examination of witnesses in open court, further than to provide, at the end of Rule 78, that nothing therein contained should ‘prevent the examination of witnesses *viva voce* when produced in open court, if the court shall, in its discretion, deem it advisable.’

“Afterwards (in August, 1842) Congress authorized this court to prescribe and regulate the mode of taking and obtaining evidence in equity cases. 5 Stat. at L. 518, § 6. While these rules remained in force substantially as originally adopted, and before any direct action of the court under the special authority of this act of Congress, the case of *Sickles v. Gloucester Co.*, 3 Wall. Jr. 186, came before Mr.

oral testimony to be taken before him at the hearing of a suit in equity, has not yet been decided by the Supreme Court.¹⁸

Justice Grier on the circuit; and he there held that, notwithstanding the rules, witnesses might still be examined in open court. It was his opinion that the act of 1789 guaranteed to suitors the right to have their witnesses so examined if they desired it, that Rule 67 did not affect or annul the act of Congress or the policy established by it, and that a party had therefore the right to demand an examination of witnesses within the jurisdiction of the court *ore tenus*, according to the principles of the common law, either by having them produced in court or by having leave to cross-examine them face to face before the examiner.

"This case was decided in 1856; and at the December term, 1861, of this court, Rule 67 was amended so as to provide for the oral examination of witnesses before an examiner. The part of the rule as amended pertinent to the present inquiry is as follows:—

"Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally; and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court, the examiner to be furnished with a copy of the bill, and answer, if any, and such examination shall take place in the presence of the parties or their agents by their counsel or solicitors; and the witnesses shall be subject to cross-examination and re-examination, and which shall be conducted as near as may be in the mode now used in common-law courts. The depositions taken upon such oral examinations shall be taken down in writing by the examiner in the form of narrative, unless he determines the examination shall be by question and answer in special instances, and when completed shall be read over to the witness and signed by him in the presence of the parties or counsel, or such of them as may attend; provided, if the witnesses shall refuse to sign the said deposition, then the examiner shall sign the same; and the examiner

may upon all examinations state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just."

"The act of 1789, in relation to the oral examination of witnesses in open court, was not expressly repealed until the adoption of the Revised Statutes, § 862 of which is as follows:—

"The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to the rules now or hereafter prescribed by the Supreme Court, except as herein specially provided."

"Since the amendment of Rule 67, in 1861, there could never have been any difficulty in bringing a case here upon appeal, so as to save all exceptions as to the form or substance of the testimony, and still leave us in a condition to proceed to a final determination of the cause, whatever might be our rulings upon the exceptions. The examiner before whom the witnesses are orally examined is required to note exceptions; but he cannot decide upon their validity. He must take down all the examination in writing, and send it to the court with the objections noted. So, too, when depositions are taken according to the acts of Congress, or otherwise under the rules, exceptions to the testimony may be noted by the officer taking the deposition, but he is not permitted to decide upon them; and when the testimony as reduced to writing by the examiner, or the deposition, is filed in court, further exceptions may be there taken. Thus both the exceptions and the testimony objected to are all before the court below, and come here upon the appeal as part of the record and proceedings there. If we reverse the ruling of that court upon the exceptions,

¹⁸ *Blease v. Garlington*, 92 U. S. 1, 7

If it is desired to review upon appeal a judge's refusal so to do, the testimony thus rejected by him, or at least its sub-

we may still proceed to the hearing, because we have in our possession and can consider the rejected testimony. But under the practice adopted in this case, if the exceptions sustained below are overruled here, we must remand the cause in order that the proof may be taken. That was done in *Conn. v. Penn. supra*, which was decided before the promulgation of the rules. One of the objects of the rule, in its present form, was to prevent the necessity for any such practice.

"While, therefore, we do not say that, even since the Revised Statutes, the circuit courts may not in their discretion, under the operation of the rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, we do say that now they are not by law required to do so; and that, if such practice is adopted in any case, the testimony presented in that form must be taken down or its substance stated in writing, and made part of the record, or it will be entirely disregarded here on an appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, or the ruling will not be considered by us. A case will not be sent back to have the rejected testimony taken, even though we might on examination be of the opinion that the objection to it ought not to have been sustained. Ample provision having been made by the rules for taking the testimony and saving exceptions, parties, if they prefer to adopt some other mode of presenting their case, must be careful to see that it conforms in other respects to the established practice of the court.

"The act of 1872 (17 Stat. at L. 197; R. S. § 914) providing that the practice, pleadings, and forms and modes of proceeding, in civil causes in the circuit and district courts, shall conform, as near as may be, to the practice, &c., in the courts of the States, has no application to this case, because it is in equity, and equity and admiralty causes are in express terms excepted from the operation of that act."

Appleton et al. v. Ecaubert, 45 Fed. R. 282, *per* Lacombe, J.:—

"Undoubtedly the method of taking testimony in equity cases in the Federal court is expensive, and frequently produces voluminous records, filled with a great deal of testimony which any court to which it may be presented will disregard; but that system, cumbrous though it be, seems to have been expressly devised for a specific end; namely, that the record should be made so full that the court of last resort may not be compelled to send an equity case back for a new hearing. A historical review of this practice will be found in the case cited *supra*, and need not be repeated here. It is sufficient to say that under it the examiner is required to note the exceptions, but cannot decide upon their validity, and must take down all the examination in writing, and send it to the court, with the objections noted; and when depositions in equity are taken according to the acts of Congress, or otherwise under the rules, the same method applies. When the testimony is reduced to writing by the examiner, or the deposition is filed in court, further exceptions may be there taken. 'Thus,' say the Supreme Court, 'both the exceptions and the testimony objected to are all before the court below, and come here upon the appeal as part of the record and proceedings there. If we reverse the ruling of that court upon the exceptions, we may still proceed with the hearing, because we have in our possession the rejected testimony.' If the defendant's objections in this case were sustained, and his motion granted, and the Supreme Court should reach the conclusion that this court erred in such determination, it would have to remand the cause, in order that the suppressed deposition and the additional proof which the complainant desires to offer might be taken. That is what was done in *Connecticut v. Pennsylvania*, 5 Wheat. 424, which case was decided before the promulgation of the rules; but, as it is one of the objects of the sixty-seventh Rule, in its present form, to prevent the necessity for any such practice, defendant's motion must be denied."

stance, must be taken down so that it may appear upon the record.¹⁹

§ 285. **Testimony taken after a Cause is at Issue and beyond the Jurisdiction of the Court.** — It often happens that a witness, whose testimony is needed by either party to a suit in equity, is beyond the jurisdiction of the court. In such a case, his testimony can be taken in three ways, — by deposition, according to the acts of Congress;¹ by a commission under a *dedimus potestatem*;² and by letters rogatory.³ Whether a Circuit Court can appoint a special examiner to take testimony beyond its territorial jurisdiction, is doubtful.⁴

§ 286. **Depositions de bene esse under the Acts of Congress.** — The equity rules say that “testimony may also be taken in the cause, after it is at issue, by deposition, according to the acts of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness either under a commission or by a new deposition taken under the act of Congress, if a court or a judge thereof shall, under all the circumstances, deem it reasonable.”¹ The acts of Congress on the subject apply to cases at common law and in equity.² They are as follows: “The testimony of any witness may be taken in any civil cause depending in a District or Circuit Court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a Circuit Court, or any clerk of a District or Circuit Court, or any chancellor, justice, or judge of a Supreme or Superior Court,

¹⁹ *Blease v. Garlington*, 92 U. S. 1, 8. For the practice when testimony is taken in a foreign language, see *Euberweg v. La Compagnie Generale Transatlantique*, 35 Fed. R. 530; *The Jacob Brandon*, 33 Fed. R. 160.

§ 285. ¹ See §§ 286, 287.

² See §§ 288, 289.

³ See § 290.

⁴ In *North Carolina Railroad Co. v. Drew*, 3 Woods, 691, this was done. In *Arnold v. Chesebrough*, 35 Fed. R. 16, and *Celluloid Manuf. Co. v. Russell*, 35 Fed. R. 17, such a request was refused.

§ 286. ¹ Rule 68. See *Stegner v. Blake*, 36 Fed. R. 183.

² *Stegner v. Blake*, 36 Fed. R. 183; U. S. R. S. § 863.

mayor or chief magistrate of a city, judge of a county court or Court of Common Pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness, and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice therein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.”³ “Every person deposing as provided in the preceding section, shall be cautioned and sworn to tell the whole truth, and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate’s presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent.”⁴ “Every deposition taken under the two preceding sections shall be retained by the magistrate taking it, until he delivers it with his own hand into the court for which it is taken; or it shall, together with a certificate of the reasons as aforesaid of taking it, and of the notice, if any, given to the adverse party, be by him sealed up and directed to such court, and remain under his seal until opened in court. But unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States, or to a greater distance than one hundred miles from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause.”⁵

These sections do not apply to the taking of depositions in

³ U. S. R. S. § 863.

⁴ U. S. R. S. § 864.

⁵ U. S. R. S. § 865.

foreign countries.⁶ A deposition cannot be taken under these statutory provisions after an appeal to the Supreme Court or the Circuit Court of Appeals has been perfected; for the case is then no longer "depending" in a Circuit Court.⁷ This practice has no application to cases pending in the Supreme Court.⁸ It has been held that the deposition may be taken before a judge of probate if his court is a court of record,⁹ or any county judge.¹⁰ It has been held that the deposition cannot be taken before a township justice,¹¹ or a judge of a county commissioner's court,¹² or a judge of a city court.¹³ The magistrate should write down and return to the court any species of evidence offered before him, and cannot exclude evidence on the ground that it is not pertinent. It belongs to the court, on the return of the deposition, to determine whether the evidence is pertinent or not.¹⁴ The relevancy of a question and the right to have the deposition taken will be tested, if the witness refuses to answer, and an application is made to punish him for contempt.¹⁵ These statutory provisions, being in derogation of the common law, are strictly construed.¹⁶ Consequently, before depositions thus taken can be read in evidence, the party that offers them must prove that compliance was made with all the requirements of the statutes, or else that these requirements were waived by the opposite party.¹⁷ There is no presumption that a deposition was properly taken.¹⁸ The certificate of the magistrate is *prima facie* evidence of such a compliance.¹⁹ His certificate that the witness lives more than one hundred miles from the place of trial is *prima facie* evidence of that fact.²⁰ If the witness does not live

⁶ Cortes Co. v. Tannhauser, 18 Fed. R. 667; Stein v. Bowman, 13 Pet. 209. But see Bischoffsheim v. Baltzer, 10 Fed. R. 1.

⁷ Richter v. Jerome, 25 Fed. R. 679, 681; The Slaughter House Cases, 10 Wall. 273.

⁸ The Argo, 2 Wheaton, 287; Richter v. Jerome, 25 Fed. R. 679, 681.

⁹ Merrill v. Dawson, Hempst. 563; s. c. sub nom. Fowler v. Merrill, 11 How. 375.

¹⁰ Voce v. Lawrence, 4 McLean, 203.

¹¹ Shutte v. Thompson, 15 Wall. 152.

¹² Garey v. Union Bank, 3 Cranch C. C. 91.

¹³ Freeman v. Holmead, 5 Cranch C. C. 102.

¹⁴ *Ex parte* William Judson, 3 Blatchf.

89; Adee v. J. L. Mott Iron Works, 46 Fed. R. 39.

¹⁵ *Ex parte* Elisha Peck, 3 Blatchf. 113; *Ex parte* William Judson, 3 Blatchf. 89. See *supra*, § 284, note 17.

¹⁶ Bell v. Morrison, 1 Pet. 351.

¹⁷ Bell v. Morrison, 1 Pet. 351; Harris v. Wall, 7 How. 693.

¹⁸ Bell v. Morrison, 1 Pet. 351; Banks v. Miller, 1 Cranch C. C. 543.

¹⁹ Harris v. Wall, 7 How. 693; Thorpe v. Simmons, 2 Cranch C. C. 195.

²⁰ Patapsco Ins. Co. v. Southgate, 5 Pet. 604; Merrill v. Dawson, Hempst. 563; s. c. sub nom. Fowler v. Merrill, 11 How. 375; Tooker v. Thompson, 3 McLean, 92.

more than one hundred miles from the place of trial, the party who has taken his deposition must prove that his disability to attend still continues, and that due diligence was used in seeking to procure his attendance, before the deposition can be read in evidence.²¹ The previous issue of a subpoena is not essential if proof of the inability of the witness is otherwise given.²² If it appears that at the time when the deposition was taken the witness lived more than one hundred miles from the place of trial, the opposite party, upon whom the burden then rests, may prove that at the time of trial he lives within one hundred miles.²³ Whether a witness resides more than one hundred miles from the place of trial is to be determined by the actual distance by usual routes.²⁴

It has been held that parol evidence is inadmissible to show a sufficient reason, where the magistrate's certificate gives an insufficient reason.²⁵ It is the proper practice for the magistrate to state in his certificate that he was not of counsel for either party nor interested in the event of the cause.²⁶ It has been held that the magistrate's certificate need not state the witness was "sworn to testify the whole truth," if it states that the witness was sworn;²⁷ nor, perhaps, that the witness is not a resident of the district where the case is pending.²⁸ The fact that a witness is a seaman on a gunboat stationed in a harbor, but liable to be ordered to some other place, is, it seems, not sufficient to authorize the taking of his testimony *de bene esse* in this manner.²⁹ No order or rule of the court is necessary in order to take deposi-

²¹ Patapsco Ins. Co. v. Southgate, 5 Pet. 604, 612. The Samuel, 1 Wheat. 9; Weed v. Kellogg, 6 McLean, 44; Jones v. Greenolds, 1 Cranch C. C. 339; Penn v. Ingraham, 2 Wash. C. C. 487; Bannert v. Day, 3 Wash. C. C. 343; Pettibone v. Derringer, 4 Wash. C. C. 215; Read v. Bertrand, 4 Wash. C. C. 558; Brown v. Galloway, Pet. C. C. 291.

²² Park v. Willis, 1 Cranch C. C., 357; Leatherberry v. Radcliffe, 5 Cranch C. C. 550. ²⁴ Ex parte Beebees, 2 Wall. Jr. 127. ²⁵ Wheaton v. Love, 1 Cranch C. C. 451. But see Dunkle v. Worcester, 5 Biss. 102. ²⁶ Gartside Coal Co. v. Maxwell, 20 Fed. R. 187; Donohue v. Roberts, 19 Fed. R. 863. But see Miller v. Young, 2 Cranch C. C. 53; Peyton v. Veitch, 2 Cranch C. C. 123; Stewart v. Townsend, 41 Fed. R. 121.

²³ Penn v. Ingraham, 2 Wash. C. C. 487; Brown v. Galloway, Pet. C. C. 291; Pettibone v. Derringer, 4 Wash. 215; Russell v. Ashley, Hempst. 546, 549; Weed v. Kellogg, 6 McLean, 44; Whitford v. Clark Co., 119 United States, 522; Pa- ²⁷ Bussard v. Catalino, 2 Cranch C. C. 421. But see Rainer v. Haynes, Hempst. 689; Garrett v. Woodward, 2 Cranch, C. C. 190. ²⁸ Sage v. Tauszky, 6 Cent. L. J. 7. ²⁹ The Samuel, 1 Wheat. 9.

tions in this manner.³⁰ Although one deposition has been already taken, yet a second deposition of the same witness may be taken without an order of the court.³¹ It is customary to file the notice or a copy thereof in the clerk's office before the issue of the subpoenas.

Any one, even a party to the suit, may serve the notice.³² If the United States be a party, it seems that service should be made upon the nearest district attorney.³³ It has been held that if an attorney has been employed in a case and is still employed therein, notice should be given to him, although he has never formally appeared on the record.³⁴ The service must be personal, unless otherwise expressly authorized as provided for in the statute.³⁵ The notice must be served a reasonable time before the taking of the deposition.³⁶ An hour's notice has been held to be reasonable.³⁷ Where the parties and their attorneys lived in the place where the deposition was taken, a notice that the deposition would be taken "before William G. Peckham, Esq., Notary Public, or some other officer authorized by law to take depositions," &c., was held sufficient when the deposition was taken before another notary.³⁸ It seems that it is not proper to serve a notice for the taking of a deposition during a term at which the cause could be tried;³⁹ or so short a time before as not to allow an attorney, if he attend, to reach the court before the commencement of that term.⁴⁰ The notice must show on its face that the contingency has happened which confers jurisdiction on the magistrate, and gives the party serving it a right to have the deposition taken: so that the party upon whom it is served may be able to judge whether it is necessary for him to attend.⁴¹ If the witnesses'

³⁰ *Pettibone v. Derringer*, 4 Wash. 215; *Buckingham v. Burgess*, 3 McLean, 368. But see *Walker v. Parker*, 5 Cranch C. C. 639.

⁴¹ *Nash, tenant of Connett v. Williams*, 20 Wall. 226.

³² *Young v. Davidson*, 5 Cranch C. C. 515.

³³ *The Argo*, 2 Gall. 314.

³⁴ *Allen v. Blunt*, 2 W. & M. 121.

³⁵ *Carrington v. Stimson*, 1 Curtis, 437. *Contra*, *Merrill v. Dawson*, Hempst. 563. s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375.

³⁶ *Jamieson v. Willis*, 1 Cranch C. C.

566; *Renner v. Howland*, 2 Cranch C. C. 441; *Barrell v. Simonton*, 3 Cranch C. C. 681.

³⁷ *Leiper v. Bickley*, 1 Cranch C. C. 20; *Bowie v. Talbot*, 1 Cranch C. C. 247; *Atkinson v. Glenn*, 4 Cranch C. C. 134. But see *Renner v. Howland*, 2 Cranch C. C. 441; *Irving v. Sutton*, 1 Cranch C. C. 567.

³⁸ *Gormley v. Bunyan*, 138 U. S. 623, 632.

³⁹ *Allen v. Blunt*, 2 W. & M. 121; *Bell v. Nimmon*, 4 McLean, 539.

⁴⁰ *Bell v. Nimmon*, 4 McLean, 539.

⁴¹ *Harris v. Wall*, 7 How. 693. *Contra*,

Christian names are unknown, the inclusion of their surnames in the notice will be sufficient.⁴² If the notice state that the taking of depositions will be adjourned from day to day, it seems that depositions taken upon an adjourned day will be received.⁴³ It seems insufficient to swear the witness to tell the whole truth concerning such interrogatories as may be put to him. He should be sworn or should affirm to tell the whole truth as far as he knows concerning the matter in controversy between the parties.⁴⁴ A notice that a party will on the same day take depositions of witnesses in different cities is unreasonable, and such depositions will be suppressed; even, it has been held, if the opposite party appeared at each by counsel and cross-examined, provided that before the direct examination the objection was specifically stated, and although such party had served similar notices of the taking of depositions at other times and places on his own behalf.⁴⁵ It seems that if the witness is properly sworn, it is not necessary that he be also cautioned to testify the whole truth;⁴⁶ and that the oath may be administered after the deposition has been reduced to writing, as well as before.⁴⁷ If the witness has conscientious scruples about taking an oath, he may affirm.⁴⁸ The certificate of the magistrate that the witness has such conscientious scruples is sufficient evidence thereof.⁴⁹ It has been held that a witness may be compelled to attend for the purpose of having his deposition taken *de bene esse*, either by a subpoena, a subpoena *duces tecum*, or the writ of *habeas corpus ad testificandum*, but that a commissioner cannot issue a writ of *habeas corpus* to take a person from jail for the purpose of giving his deposition before such a commissioner.⁵⁰ A party cannot be compelled by a subpoena to produce papers, books, &c., which would not be material or competent as evidence, merely for the purpose of re-

Debutts v. McCulloch, 1 Cranch C. C. 286; Sage v. Tauszky, 6 Cent. L. J. 7.

⁴² Claxton v. Adams, 1 MacArthur (D. C.), 496. See Carrington v. Stimson, 1 Curt. 437.

⁴³ Knode v. Williamson, 17 Wall. 586; Sage v. Tauszky, 6 Cent. L. J. 7. But see Kirkpatrick v. Baltimore & Ohio R. R. Co., 24 Pittsb. L. J. 51.

⁴⁴ Shutte v. Thompson, 15 Wall. 152; Pendleton v. Forbes, 1 Cranch C. C. 507; Garrett v. Woodward, 2 Cranch C. C. 190; Rainer v. Haynes, Hempst. 689; Wil-

son S. M. A. v. Jackson, 1 Hughes, 295; United States v. Smith, 4 Day, 121.

⁴⁵ Uhle v. Burnham, 44 Fed. R. 729; U. S. C. C., S. D. N. Y., Lacombe, J.

⁴⁶ Doe d. Moore, v. Nelson, 3 McLean, 383; Brown v. Piatt, 2 Cranch C. C. 253. *Contra*, Luther v. The Merritt Hunt, 1 Newb. Adm. 4.

⁴⁷ Tooker v. Thompson, 3 McLean, 92.

⁴⁸ U. S. R. S. § 1.

⁴⁹ Elliot v. Hayman, 2 Cranch C. C. 678.

⁵⁰ *Ex parte* Peck, 3 Blatchf. 113; United States v. Tilden, 10 Ben. 565; *infra*, § 366.

freshing his memory.⁵¹ It has been held that after a party has examined a witness in chief under the statutory provisions and demanded an adjournment, he has no right to withdraw the proceedings, and that any party in interest may compel such witness to appear and submit to cross-examination.⁵² Either party may obtain an order compelling the return of a deposition thus taken.⁵³ After the deposition is complete, the court may allow a further cross-examination on newly discovered facts.⁵⁴ The court has the power to compel the opening of such a deposition before the trial upon the motion of either party against the objection of the other.⁵⁵ It is the safer practice to have the witness sign his deposition.⁵⁶ No notice of filing a deposition need be given to a party who knows it has been taken.⁵⁷

§ 287. **Form of Deposition under Acts of Congress.** — The deposition should state, either in its body or in its caption, the name of the court where the cause is pending,¹ the title of the cause,² and the place where the deposition is taken.³ A slight error in the caption, such as a mistake in spelling the name of a party,⁴ or the omission from the title of the cause of the name of one of several plaintiffs or defendants is not a ground of suppressing the deposition.⁵ The heading of the notice: "United States of America, State of Illinois, County of Cook, ss. In the Circuit Court of the United States," was held not sufficiently irregular to avoid the deposition.⁶ The omission of the name of the county from the caption is not a fatal defect.⁷ The certificate should

⁵¹ *Ex parte* Peck, 3 Blatchf. 113; *United States v. Tilden*, 10 Ben. 576.

⁵² *Ex parte* Barnes, 1 Sprague, 133; *Re Rindskopf*, 24 Fed. R. 542.

⁵³ *First Nat. Bank of Grand Haven v. Forest*, 44 Fed. R. 246.

⁵⁴ *The Normandie*, 40 Fed. R. 590.

⁵⁵ *United States v. Tilden*, 10 Ben. 170.

⁵⁶ *Thorpe v. Simmons*, 2 Cranch C. C. 195.

⁵⁷ *Nelson v. Woodruff*, 1 Black, 156; *Leatherberry v. Radcliffe*, 5 Cranch C. C. 559. For practice when a deposition is destroyed, see *Stebbins v. Duncan*, 108 U. S. 32.

§ 287. ¹ *Van Ness v. Heineke*, 2 Cranch C. C. 259.

² *Peyton v. Veitch*, 2 Cranch C. C. 123; *Smith v. Coleman*, 2 Cranch C. C. 237; *Centre v. Keene*, 2 Cranch C. C. 198;

Waskern v. Diamond, Hempst. 701; *Allen v. Blunt*, 2 W. & M. 121. But see *Voce v. Lawrence*, 4 McLean, 203; *Buckingham v. Burgess*, 3 McLean, 368; *Pamill v. Eliason*, 3 Cranch C. C. 358; *Merrill v. Dawson*, Hempst. 563; s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375.

³ *Pendleton v. Forbes*, 1 Cranch C. C. 507; *Tooker v. Thompson*, 3 McLean, 92.

⁴ *Van Ness v. Heineke*, 2 Cranch C. C. 259.

⁵ *Pamill v. Eliason*, 3 Cranch C. C. 358; *Egbert v. Citizens' Ins. Co.*, 7 Fed. R. 47; *Merrill v. Dawson*, Hempst. 563, s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375. See also *Voce v. Lawrence*, 4 McLean, 203.

⁶ *Gormley v. Bunyan*, 138 U. S. 623, 634.

⁷ *Van Ness v. Heineke*, 2 Cranch C. C. 259.

show that the magistrate reduced the testimony to writing himself, or that it was done by the witness in his presence.⁸ It is the better practice for the magistrate to certify that he reduced the deposition to writing in the presence of the witness.⁹ No other person can reduce the deposition to writing except the magistrate or the deponent in his presence,¹⁰ except by consent.¹¹ A certificate by the magistrate that the deposition was reduced to writing in his presence, without saying by whom, is bad.¹² The objection that the magistrate does not certify that the deposition was signed by the witness in his presence, is not fatal.¹³ If the deponent reduces the deposition to writing, the magistrate must certify that it was reduced to writing by the deponent in his presence.¹⁴ A certificate by the magistrate that the deposition was reduced to writing by the witness and himself was held sufficient.¹⁵ If the deposition bears the witness' signature and appears to have been reduced to writing by the magistrate, it is sufficient, although the certificate does not say that it was signed by the witness.¹⁶ In one case, a deposition was rejected because the magistrate certified that "the form," an evident slip of the pen for "the same," which were the words of the statute then in force, "was reduced to writing."¹⁷ The certificate should state whether the parties were or were not present or represented.¹⁸ The certificate should contain the reasons for which the deposition was taken.¹⁹ It has been held that a certificate sufficiently shows the reason for making depositions, if the caption of the deposition states where the depositions were taken, without giving the distance from the

⁸ *Cook v. Burnley*, 11 Wall. 659; *United States v. Smith*, 4 Day (Conn.), 121; *Bell v. Morrison*, 1 Pet. 351, 355. But see *Bussard v. Catalino*, 2 Cranch C. C. 421.

⁹ *Donahue v. Roberts*, 19 Fed. R. 863. *Contra*, *Vasse v. Smith*, 2 Cranch C. C. 31; *Van Ness v. Heineke*, 2 Cranch C. C. 259; *Centre v. Keen*, 2 Cranch C. C. 198.

¹⁰ *Marstin v. McRae*, Hempst. 688; *Rainer v. Haynes*, Hempst. 689.

¹¹ *Stewart v. Townsend*, 41 Fed. R. 121.

¹² *United States v. Smith*, 4 Day (Conn.), 121.

¹³ *Van Ness v. Heineke*, 2 Cranch C. C. 259; *Centre v. Keen*, 2 Cranch C. C. 198.

¹⁴ *Edmonson v. Barrel*, 2 Cranch C. C.

228; *Rainer v. Haynes*, Hempst. 689; *Pettibone v. Derringer*, 4 Wash. 215.

¹⁵ *Elliott v. Piersol*, 1 Pet. 328, 335; *Cook v. Burnley*, 11 Wall. 659. But see *Vasse v. Smith*, 2 Cranch C. C. 31.

¹⁶ *Bussard v. Catalino*, 2 Cranch C. C. 421. But see *Cook v. Burnley*, 11 Wall. 659; *Donahue v. Roberts*, 19 Fed. R. 863.

¹⁷ *Voce v. Lawrence*, 4 McLean, 203; *Burton v. Simmons*, 2 Cranch C. C. 195.

¹⁸ *Curtis v. Railway Co.*, 6 McLean, 401.

¹⁹ *Shutte v. Thompson*, 15 Wall. 152; *Sage v. Tauszky*, 6 Cent. L. J. 7; *Harris v. Wall*, 7 How. 693; *Woodward v. Hall*, 2 Cranch C. C. 235; *Wheaton v. Love*, 1 Cranch C. C. 451; *Jones v. Knowles*, 1 Cranch C. C. 523. See *supra*, § 236.

place of taking to the place of trial; if the distance is in fact, and is well known by all parties to be, more than one hundred miles from the place of trial.²⁰ The notice need not be attached to the deposition.²¹ If the deposition is sent by mail, the magistrate should certify that it was retained by him until sealed up and directed to the court.²² The deposition need not state that the deposition has been sealed, provided that it appears by the envelope that the deposition was sealed.²³ If the deposition is sealed up with the seal of a corporation, across which are written the name or the names of the person or persons who took the deposition, it is sufficient.²⁴ The accidental opening in the mail of an envelope containing a deposition taken by a commission under Rule 67 does not authorize the suppression of the deposition.²⁵ If the magistrate have an official seal under which he usually certifies his acts, it seems that this certificate should be under that seal.²⁶ It seems that it will be presumed that he occupies the official position which he assumes in his certificate;²⁷ certainly so if he be a notary public and certifies under his notarial seal;²⁸ and this may always be proved by oral testimony like any other material fact.²⁹ The deposition may be directed to either the judge or the clerk of the court.³⁰ It cannot be read in evidence if opened anywhere but in court,³¹ except by consent, which it will be well to have appear by writing duly signed and filed with or indorsed on the deposition.³² Where the certificate fails to state certain material facts, by leave of the court the deposition may be withdrawn from the clerk's office, the certificate amended, and the deposition then refiled.³³ If an attorney appear and cross-examine a witness without objection, he thereby waives any no-

²⁰ *Egbert v. Citizens' Ins. Co. of Mo.*, 7 Fed. R. 47.

²¹ *Stewart v. Townsend*, 41 Fed. R. 121.

²² *Shankwiler v. Reading*, 4 McLean, 240; *Jones v. Neale*, 1 Hughes, 268. But see *Stewart v. Townsend*, 41 Fed. R. 121.

²³ *Egbert v. Citizens' Ins. Co. of Mo.*, 7 Fed. R. 47, 50.

²⁴ *Re Thomas*, 35 Fed. R. 337.

²⁵ *Eiffert v. Craps*, 44 Fed. R. 164.

²⁶ *Paul v. Lowry*, 2 Cranch C. C. 628. But see *Price v. Morris*, 5 McLean, 4.

²⁷ *Ruggles v. Bucknor*, 1 Paine, 358; *Price v. Morris*, 5 McLean, 4; *Vasse v. Smith*, 2 Cranch C. C. 31; *Whitney v.*

Huntt, 5 Cranch C. C. 120. But see *Tooker v. Thompson*, 3 McLean, 92.

²⁸ *Dinsmore v. Maroney*, 4 Blatchf. 416.

²⁹ *Paul v. Lowry*, 2 Cranch C. C. 628; *Dunlop v. Munroe*, 1 Cranch C. C. 536.

³⁰ *Thorp v. Orr*, 2 Cranch C. C. 335; *Whitney v. Huntt*, 5 Cranch C. C. 120.

³¹ *Beale v. Thompson*, 8 Cranch, 70; *The Roscius*, 1 Brown Adm. 442. *In re Thomas*, 35 Fed. R. 337.

³² *The Roscius*, 1 Brown Adm. 442.

³³ *Gartside Coal Co. v. Maxwell*, 20 Fed. R. 187; *Donahue v. Roberts*, 19 Fed. R. 863; *Leatherberry v. Radcliffe*, 5 Cranch C. C. 550.

tice or irregularity in the notice,³⁴ or in the form and manner of the proceedings,³⁵ or, it seems, an incompetency in the witness then known to him,³⁶ or any other formal defect. His presence, however, if he declines to take any part in the proceedings, does not.³⁷ It is the safer and the usual practice for the counsel present to note on the record all objections to the form of questions; and a failure to note such an objection might be held a waiver by a party who was present or represented at the examination. Irregularities are waived by consent to open depositions "without prejudice to any objections to the inclosed deposition other than relating to publication and opening, which is hereby waived."³⁸ An objection to the failure of a witness to produce a paper to which he referred, or which was called for, can only be made by a motion to suppress the deposition.³⁹ In general, all defects in form can only be raised by a motion to suppress the deposition,⁴⁰ and the court may, when such a motion is granted, usually allow an adjournment of the hearing in order that the testimony may again be taken.⁴¹

§ 288. *Commissions issued under a Deditus Potestatem.*—The Revised Statutes provide that "in any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *deditus potestatem* to take depositions according to common usage." "And the provisions of Sections eight hundred and sixty-three, eight hundred and sixty-four, and eight hundred and sixty-five shall not apply to any depositions to be taken under the authority of this section."¹ This statute applies in criminal prosecutions,² actions at law,³ and cases in equity.⁴ The words "common usage" when applied to a suit in equity, signify the ordinary practice of courts of equity.⁵ In

³⁴ *Dinsmore v. Maroney*, 4 Blatchf. 416.

³⁵ *Shutte v. Thompson*, 15 Wall. 152; *In re Thomas*, 35 Fed. R. 822.

³⁶ *United States v. One Case*, 1 Paine, 400.

³⁷ *Harris v. Wall*, 7 How. 693.

³⁸ *Stewart v. Townsend*, 41 Fed. R. 121.

³⁹ *Blackburn v. Crawford*, 3 Wall. 175; *Winans v. New York & E. R. R. Co.*, 21 How. 88.

⁴⁰ *Claxton v. Adams*, 1 MacArthur (D. C.), 496; *Bank of Danville v. Trav- ers*, 4 Biss. 597; *Brooks v. Jenkins*, 3

McLean, 432; *Uhle v. Burnham*, 44 Fed. R. 729, 730; *Howard v. Stillwell B. M. Co.*, 139 U. S. 199.

⁴¹ *Luther v. The Merritt Hunt*, 1 Newb. 4; *Doe d. Moore v. Nelson*, 3 McLean, 383.

§ 288. ¹ U. S. R. S. § 866; *Jones v. Oregon Central R. R. Co.*, 3 Sawyer, 523.

² *United States v. Cameron*, 15 Fed. R. 794; *United States v. Wilder*, 14 Fed. R. 333.

³ *Peters v. Prevost*, 1 Paine, 64.

⁴ *Bischoffheim v. Baltzer*, 10 Fed. R. 1.

⁵ *United States v. Parrott*, 1 McAl. 447.

a case of doubtful authority, the condition that a safe conduct be furnished to the plaintiff was inserted in an order for a commission to examine witnesses on the part of the defendant in a foreign country,⁶ but a commission to prove documents was allowed without such a condition.⁷ Depositions may be taken under this section of the Revised Statutes, even though the witness live within one hundred miles of the court where the cause is pending;⁸ or in a country with which the United States are at war.⁹ Such a commission is not granted as of course, but only upon good cause shown.¹⁰ The application must be made in open court, and not to a judge at chambers;¹¹ and must be accompanied by an affidavit showing that the testimony which the party desires to take is material.¹² It seems that the commission need not specify the exact place where the depositions are to be taken; but if it do, the commissioners should conform to it in that respect.¹³ Whether a party will or will not be required before the commission is issued to name the witnesses to be examined under it, depends upon the discretion of the court, to be exercised under the circumstances of each case.¹⁴ Before the issue of the commission, the proposed interrogatories should be filed¹⁵ and served upon the opposite party or his attorney;¹⁶ and the latter given a reasonable time, usually fixed by the court, within which to object to them and to file cross-interrogatories.¹⁷ If he omit to do so, the commission may be issued without further notice.¹⁸ The interrogatories are drawn up substantially as those for the examination of witnesses within the jurisdiction of the court.¹⁹ Objections to interrogatories or cross-interrogatories should be in the form of exceptions to them, and must be filed before the commission issues; or otherwise will be held waived.²⁰ If the parties

⁶ *Hollander v. Baiz*, 40 Fed. R. 659.

⁷ *Hollander v. Baiz*, 43 Fed. R. 35.

⁸ *Wellford v. Miller*, 1 Cranch C. C. 485; *Russell v. McLellan*, 3 W. & M. 157.

⁹ *Peters v. Prevost*, 1 Paine, 64.

¹⁰ *United States v. Parrott*, 1 McAll. 447.

¹¹ *Peters v. Prevost*, 1 Paine, 64.

¹² *Sutton v. Mandeville*, 1 Cranch C. C. 115; *United States v. Parrott*, 1 McAll. 447.

¹³ *Rhoades v. Selin*, 4 Wash. 715.

¹⁴ *Parker v. Nixon*, Baldw. 291.

¹⁵ *Cunningham v. Otis*, 1 Gall. 166.

¹⁶ *Rhoades v. Selin*, 4 Wash. 715; *Merrill v. Dawson*, Hempst. 563; s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375.

¹⁷ *Frevall v. Bache*, 5 Cranch C. C. 463; *The Norway*, 1 Ben. 493. Leave to cross-examine orally will rarely be given. *Coates v. Merrick Thread Co.*, 41 Fed. R. 73.

¹⁸ *Cocker v. F. H. & B. Co.*, 1 Story, 169.

¹⁹ *Rhoades v. Selin*, 4 Wash. 715.

²⁰ *Cocker v. Franklin H. & B. Co.*, 1 Story, 169.

cannot agree as to their form or substance, a reference may be ordered to a master, whose report will be reviewed by the court.²¹ If there be any doubt as to the relevancy or propriety of an interrogatory, the ultimate decision thereon will be reserved until the hearing, and it will be allowed to stand and be answered. If there be no doubt as to its irrelevancy or impropriety, it will be stricken out before the commission issues.²² A commission must always name or designate the commissioner or commissioners.²³ A woman may be a commissioner, even though she be the wife of the witness to be examined.²⁴ The court may grant an order that exhibits annexed to a deposition already taken may be removed from the file and attached to a commission, provided that copies of them are left in their place.²⁵

§ 289. *Proceedings under a Dedimus Potestatem.*—If the application does not state when and where the commission is to be executed, the party at whose instance, or the commissioner to whom it is issued, should notify the adverse party or his solicitor before the depositions are taken.¹ The notice should name the year as well as the day.² When, however, a party, after notice of an opportunity to do so, has neglected to file cross-interrogatories, no further notice to him is necessary.³ The notice should be served personally, or else left at the house of the person upon whom it is made with a member of his family of sufficient intelligence.⁴ The person upon whom it is left, however, need not be informed of its purport.⁵ Service by mail, unless actually received in time, is insufficient.⁶ An hour's notice of the time of taking a deposition in the place where the attorney to whom it is given dwells, has been held sufficient.⁷ The regulation of the proceedings under a commission is a matter in the discretion of the court issuing it.⁸ A commissioner is appointed by and repre-

²¹ *Cocker v. F. H. & B. Co.*, 1 Story, 169; *Bondreau v. Montgomery*, 4 Wash. 186.

²² *Cocker v. F. H. & B. Co.*, 1 Story, 169.

²³ *Vanstophorst v. Maryland*, 2 Dall. 401.

²⁴ *The Norway*, 2 Ben. 121.

²⁵ *Daly v. Maguire*, 6 Blatchf. 137.

§ 289. ¹ *Rhoades v. Selin*, 4 Wash. 715; *Knode v. Williamson*, 17 Wall. 586; *Merrill v. Dawson*, Hempst. 563; s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375; *Dunlop v. Munroe*, 1 Cranch C. C. 536.

² *Knode v. Williamson*, 17 Wall. 586.

³ *Merrill v. Dawson*, Hempst. 563, s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375.

⁴ *Merrill v. Dawson*, Hempst. 563; s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375.

⁵ *M'Call v. Towers*, 1 Cranch C. C. 41.

⁶ *Walker v. Parker*, 5 Cranch C. C. 639.

⁷ *Nicholls v. White*, 1 Cranch C. C. 59.

⁸ *Cunningham v. Otis*, 1 Gall. 166.

sents the court; and is no more than is an arbitrator the representative of the party nominating him.⁹ The authority given to a commissioner is special, and must be strictly construed.¹⁰ A commission issued to more than one commissioner must be executed and returned by all of them,¹¹ unless it is otherwise so provided in it;¹² and if any one else, except a judge in a foreign country whose laws do not permit a private individual to take testimony alone,¹³ join in its execution on return, the testimony taken under it will also be suppressed.¹⁴ A commission must be executed at the time and place named in it, or in the notice.¹⁵ It has been held that the witnesses under such a commission should be examined alone; and the parties are not allowed to be present either in person or by attorney, unless the court otherwise directs.¹⁶ The interrogatories may be shown the witness before he is called upon to give his testimony.¹⁷ He must be examined as to each interrogatory and cross-interrogatory; and if he improperly omits to answer any one of them, or if any one of them, an answer to which would be legal evidence, is not put to him, his whole deposition may be suppressed at the instance of the party who might be thereby injured.¹⁸ If, however, the deposition have been issued *ex parte*, the adverse party having omitted to file cross interrogatories after an opportunity to do so has been given him, it has been said that as many, or as few, of these interrogatories as the party who filed them thinks proper may be put, provided that the general interrogatory is not omitted.¹⁹ If the cross-interrogatories are put, it makes no

⁹ *Jones v. Oregon Central R. R. Co.*, 3 Sawyer, 523; *Gilpins v. Consequa*, Pet. C. C. 85; *Guppy v. Brown*, 4 Dall. 410.

¹⁰ *Guppy v. Brown*, 4 Dall. 410; *Armstrong v. Brown*, 1 Wash. 43; *Boudereau v. Montgomery*, 4 Wash. 186.

¹¹ *Guppy v. Brown*, 4 Dall. 410; *Armstrong v. Brown*, 1 Wash. 43; *Munns v. Dupont*, 3 Wash. C. C. 31.

¹² *The Griffin*, 4 Blatchf. 203; *Lonsdale v. Brown*, 3 Wash. 404.

¹³ *Winthrop v. Union Insurance Co.*, 2 Wash. 7.

¹⁴ *Willings v. Consequa*, Pet. C. C. 301. *Barnet v. Day*, 3 Wash. 243.

¹⁵ *Rhodes v. Setin*, 4 Wash. 715; *Boudereau v. Montgomery*, 4 Wash. 186; *Knode v. Williamson*, 17 Wall. 586; *Buddeum v. Kirk*, 3 Cranch, 293.

¹⁶ *Cunningham v. Otis*, 1 Gall. 166. But see *Knode v. Williamson*, 17 Wall. 586; *Merrill v. Dawson*, Hempst. 563; s. c. *sub nom. Fowler v. Merrill*, 11 How. 375.

¹⁷ *North Carolina R. R. v. Drew*, 3 Woods, 691.

¹⁸ *Ketland v. Bissett*, 1 Wash. 144; *Nelson v. United States*, Pet. C. C. 235; *Winthrop v. Union Ins. Co.*, 2 Wash. 7; *Bell v. Davidson*, 3 Wash. C. C. 328; *Richardson v. Golden*, 3 Wash. C. C. 109; *Dodge v. Israel*, 4 Wash. 323; *Gilpins v. Consequa*, Pet. C. C. 85; s. c. 3 Wash. 184. But see *Gass v. Stinson*, 3 Sumner, 98.

¹⁹ *Merrill v. Dawson*, Hempst. 563; s. c. *sub nom. Fowler v. Merrill*, 11 How. 375.

difference how soon after the direct interrogatories have been answered the witness is called upon to answer them.²⁰ No additional interrogatories, however, can be filed with or put by or before the commissioner.²¹ Under extraordinary circumstances the examination of a witness not named in the commission might be permitted.²² The deposition may be taken down in writing either by the magistrate or by the deponent in the presence of the magistrate;²³ but not by the counsel for either of the parties.²⁴ If exhibits are referred to by the witness, they should be annexed to the deposition or identified by marks or reference.²⁵ A paper referred to by a witness, but which is neither in his own power nor in that of the party making the objection, need not, however, be included in the deposition or thus identified.²⁶ It has been held that the deposition need not be signed by the witness.²⁷ A deposition prepared and signed some time before the oath is administered is improper and will be suppressed.²⁸ The depositions should be attached to the commission, and, with them, a certificate by all the commissioners that they have complied with the requirements above described. The commission should then be sent or delivered to the clerk's office of the court unopened, and must there remain so till publication is allowed by order or consent.²⁹ The return, or certificate, of the commissioners should state that they were sworn, unless that ceremony has been waived, or they are officers qualified to administer an oath.³⁰ The return should also state the time and place of taking the depositions;³¹ that each witness was sworn or affirmed, but not that he was cautioned; nor need it state the form of the oath.³² The return need not state in whose

²⁰ *Gilpins v. Consequa*, Pet. C. C. 85; s. c. 3 Wash. 184.

²¹ *Cunningham v. Otis*, 1 Gall. 166; *Merrill v. Dawson*, Hempst. 563; s. c. *sub nom.* *Fowler v. Merrill*, 11 How. 375.

²² *The Infanta*, Abbott's Ad. 263.

²³ *Stockwell v. United States*, 3 Cliff. 284; *Keene v. Meade*, 3 Pet. 1; s. c. *sub nom.* *Meade v. Keane*, 3 Cranch C. C. 51.

²⁴ *United States v. Pings*, 4 Fed. R. 714. But see *Nicholls v. White*, 1 Cranch C. C. 59; *Atkinson v. Glenn*, 4 Cranch C. C. 134.

²⁵ *Dodge v. Israel*, 4 Wash. 323.

²⁶ *Winans v. New York & Erie R. R. Co.*, 21 How. 88.

²⁷ *Ketland v. Bissett*, 1 Wash. 144.

²⁸ *Dodge v. Israel*, 4 Wash. 323; *North Carolina R. R. Co. v. Drew*, 3 Woods, 691.

²⁹ *Boudereau v. Montgomery*, 4 Wash. 186; *Frevall v. Bache*, 5 Cranch C. C. 463; *United States v. Price*, 2 Wash. 356.

³⁰ *Frevall v. Bache*, 5 Cranch C. C. 463; *Hoyt v. Hammekin*, 14 How. 346. But see *Gilpins v. Consequa*, Pet. C. C. 85; s. c. 3 Wash. 184.

³¹ *Rhodes v. Selin*, 4 Wash. 715; *Boudereau v. Montgomery*, 4 Wash. 186.

³² *Jones v. Oregon Central R. R. Co.*, 3 Sawyer, 523; *Keene v. Meade*, 3 Pet. 1;

handwriting the depositions were taken down ;³³ nor, if the witness was an alien, whether or not he was examined by means of an interpreter.³⁴ This certificate will be presumptive evidence of the facts therein stated in relation to the execution of the commission.³⁵ Otherwise, proceedings under these commissions should conform substantially to those under commissions to examine witnesses within the jurisdiction of the court.³⁶ Any objection to the form or manner of the proceedings can only be raised by a motion to suppress the deposition,³⁷ provided that sufficient time within which to make such a motion remains between the return of the commission and the hearing.³⁸ Should a foreign plaintiff refuse to testify before a commission when required so to do, the court may deny him relief in the suit.³⁹

§ 290. *Letters Rogatory.* — When the witnesses whose testimony is desired are in a country whose laws do not permit of the execution of a commission issued from a foreign court, their testimony can only be taken by means of letters rogatory. "This method of obtaining testimony from witnesses in a foreign country has always been familiar in the Courts of Admiralty ; but it is also deemed to be within the inherent powers of all courts of justice. For, by the law of Nations, courts of Justice, of different countries, are bound mutually to aid and assist each other, for the furtherance of justice ; and hence, when the testimony of a foreign witness is necessary, the Court before which the action is pending, may send to the Court within whose jurisdiction the witness resides, a writ, either patent or close, usually called a letter rogatory, or a commission *sub mutuae vicissitudinis obtentu, ac in juris subsidium*, from those words contained in it. By this instrument the court abroad is informed of the

s. c. *sub nom.* Meade v. Keane, 3 Cranch C. C. 51.

³³ Keene v. Meade, 3 Pet. 1 ; s. c. *sub nom.* Meade v. Keane, 3 Cranch C. C. 51 ; Jones v. Oregon Central R. R. Co., 3 Sawyer, 523.

³⁴ Gilpins v. Consequa, Pet. C. C. 85 ; s. c. 3 Wash. 184.

³⁵ Merrill v. Dawson, Hempst. 563 ; s. c. *sub nom.* Fowler v. Merrill, 11 How. 375 ; Boudereau v. Montgomery, 4 Wash. 186 ; Winter v. Simonton, 3 Cranch C. C. 104.

³⁶ Jones v. Oregon Central R. R. Co.,

3 Sawyer, 523 ; United States v. Parrott, 1 McAll. 447. See § 284.

³⁷ Blackburn v. Crawfords, 3 Wall. 175 ; Winans v. New York & Erie R. R. Co., 21 How. 88 ; Doane v. Glenn, 21 Wall. 33 ; York Co. v. Central R. R., 3 Wall. 107 ; Walker v. Parker, 5 Cranch C. C. 639.

³⁸ Sergeant v. Biddle, 4 Wheat. 508 ; Mechanics' Bank v. Seton, 1 Pet. 299 ; Buddicum v. Kirk, 3 Cranch, 263 ; Alsop v. Commercial Ins. Co., 1 Sumner, 451.

³⁹ Heath v. Erie R. R. Co., 9 Blatchf. 316. Cf. *infra*, § 290, note 2.

pendency of the cause, and the names of the foreign witnesses, and is requested to cause the depositions to be taken, in due course of law, for the furtherance of justice; with an offer, on the part of the tribunal making the request, to do the like for the other in a similar case. The writ or commission is usually accompanied by interrogatories, filed by the parties, on each side, to which the answers of the witnesses are desired. The commission is executed by the judge who receives it, either by calling the witness before himself, or by the intervention of a commissioner for that purpose; and the original answers, duly signed and sworn to by the deponent, and properly authenticated," or duly authenticated copies of the same "are returned with the commission to the Court from which it issued. The Court of Chancery has always freely exercised this power, by a commission, either directed to foreign magistrates, by their official designation, or more usually, to individuals by name; which latter course, the peculiar nature of its jurisdiction and proceedings enables it to induce the parties to adopt by consent, where any doubt exists as to its inherent authority."¹ A special application for an order for letters rogatory may be made to the court, and will be granted in the first instance without issuing a commission, upon satisfactory proof that the authorities abroad will not allow the testimony to be taken in any other manner.² "When any

§ 230. ¹ Greenleaf's Evidence, § 320. See for a good form, *Nelson v. United States*, 1 Pet. C. C. 236, note a. See also *Cunningham v. Otis*, 1 Gall. 166; Hall's Adm. Pr. Part 2, tit. 19, Vol. I *cum add.*, and tit. 27, *cum add.*, pp. 37, 38, 55-60; Clerke's Praxis, tit. 27; 1 Roll. Abr. 530, pl. 15; Oughton's Ordo Judiciorum, Vol. I. pp. 150-152, tit. 95, 96; Wharton's International Law Digest, Vol. III. § 413.

² 1 Hoffman's Ch. Pr. 482; Daniell's Ch. Pr. (3d Am. ed. by Judge Perkins), Vol. II. p. 953; *Gason v. Wordsworth*, 2 Ves. Sen. 335; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475.

Secretary Fish wrote as follows concerning the refusal of the German government to allow American consuls to examine witnesses in Germany under commissions from the courts of the United States:—

"It appears to this department that

the German government has labored under a serious misapprehension in the matter. The minister of foreign affairs objects to the taking of the desired testimony by the consuls, under the commission in question, on the ground that it is an exercise of functions by consular officers in the German Empire not warranted by Article IX. of the German-American convention of December 11, 1871. Under our system of jurisprudence, where the testimony of persons beyond the limits of the United States is desired by either party to an action pending in the courts, the same is taken on commission. For this purpose application is made to the court in which the action is pending, and when granted a person is agreed on by the parties, or named by the court, to take the evidence, and an order is entered in the court to that effect. Questions are prepared by each party, which are propounded to the witnesses by the

commission or letter rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have any interest, is executed by the court

person so named, or an oral examination is sometimes provided for, at which both parties are represented by counsel. The answers to the questions are taken, and the evidence thus taken is certified by the commission named, and returned to the court to be read at the trial. No claim is made that a consul of the United States, as such, has, by treaty or by convention, the right to take such testimony. It is no part of his official duty, nor does he act as consul in so doing. He acts in the matter as a private individual, at the request of the parties or the appointment of the court. The government in no case takes any part in these appointments; they are made by the courts in the independent discharge of their functions as a matter of practice, and with the sole view of the administration of justice and the ascertainment of the facts of the case at issue between the parties litigant. The person named may be a subject of the German empire, an American citizen, or may belong to any other nationality. He is selected in each particular case as an individual, who, from character, residence, or other qualification, will fairly propound the questions and certify the answers. His services are purely ministerial, and entirely voluntary. He has no power to compel the attendance of witnesses or to punish them for contempt. No authority is given except to put questions and certify answers, and no other is claimed for him. The same proceedings are taken and the same rule applies in every case, whoever the parties to the action may be. The fact that the government is a party or has an interest in the action in no respect alters the rule. It is a proceeding in the interest of justice to arrive at the truth between disputed facts in an action pending in the court. The testimony in any particular case may be necessary to save a private person, whether German or American, from penalties to which he would otherwise be liable. On the other hand, it may be required in the interest of good government here or elsewhere to

punish attempted frauds upon the public revenue. These are objects of common interest to all commercial powers, which the government of Germany from its well-known character will be the first to appreciate and to vindicate. Upon an examination of the particular order in question, it will be seen that it provides for the taking of testimony for the benefit of either party; and from this fact and from the letter of the district attorney it will be found to be an order made for the benefit of both parties, and obtained by consent or upon their joint application. So far as any objection may be made to the execution of this particular commission, therefore, by the branch house of the defendants in Germany, it appears that the order was made on the solicitation or consent of the house in New York. Any obstacle thrown in the way of the taking of this testimony by the German government amounts to a refusal to permit two parties to ascertain the truth to be used for their mutual benefit in a legal proceeding. It is confidently believed that an explanation of the matter will be entirely satisfactory to the German government. The United States has no desire to obtain for its consuls in Germany any authority or functions except such as rightly belong to them; and at the same time this government will be extremely reluctant to admit that a person becoming a consul of the United States is thereby excluded from privileges which are allowed to unofficial persons, or becomes disqualified for the discharge of duties to his fellow-citizens which may be performed by any other reputable person, of whatever nationality, but which are likely to be asked of him by reason of his official position, making him more likely than others to be known to those needing such services. You will fully explain this matter to the minister of foreign affairs, and it is confidently hoped and expected that on this full explanation all objection to the action of the consuls in question will be withdrawn, and that the German government will view it as an act of

or the commissioner to whom it is directed, it shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where it is executed. On re-

comity, and in aid of the proper administration of government and justice, to facilitate the ascertainment of the facts in the case now at issue between this government and the Messrs. Wolff. A continued objection or obstruction to such ascertainment would be the cause of very serious regret to this government.

"You may, in your discretion, read and give a copy of this despatch, to this point, to the minister of foreign affairs, for the purpose of explanation.

"Under the circumstances set out in your No. 9, your action in intimating to the several consuls the difficulties which might arise from action on their part until the matter should be adjusted, was a wise precaution, and is approved.

"Should the German government withdraw the objections now raised, you will so inform the several consuls, and inform this Department by telegraph. You will also instruct the consuls, in executing any such commission, to assume no authority as consuls, and to be careful in their action to give as little offence to the German government and to its subjects as possible." (Mr. Fish, Sec. of State, to Mr. N. Fish, Aug. 18, 1874, MSS. Inst. Germ., For. Rel., 1874.)

"Your No. 33, under date of the 20th of October last, narrating your interview with Mr. von Bulow at the foreign office in relation to the objection interposed by the German government to allowing consuls of the United States to serve as commissioners to take testimony to be used in judicial proceedings pending in this country, has been received. Your representations to the minister are approved. Although Mr. von Bulow stated to you that instructions on the subject had been sent to Mr. von Schlozer a fortnight prior to your interview and conversation, nothing has been heard from that gentleman in this connection. The objection interposed by the German government to the obtaining of testimony in Germany to be used in the courts of this country is much to be regretted, and, as appears from the admission made to you by Mr. von Bulow,

the Germans whose interests led them to resist the taking of the testimony, and who invoked the interposition of their government to prevent it, are now known to have been in the wrong. It would have been quite as satisfactory to this government had the reply of the German government on a subject presented to their consideration, through the representative of this government at Berlin, been communicated also through him, and, as is shown, some delay which has occurred might have been avoided. As Mr. von Schlozer has not communicated the answer of his government, it will not be amiss that you inform Mr. von Bulow that we are still without any reply. You will call his attention to the fact that the suit in which the testimony is sought is one in which the government of the United States is itself a party.

"I inclose herewith copies of existing statutes (which are embodied in Sections 4071, 4072, 4073, and 4074 of the Revised Statutes of the United States) enacted by this government to insure to other powers the opportunity of obtaining testimony in this country in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest. In these enactments, which have long been in force in this country, this government has manifested its friendship to other powers, as well as its desire to aid in the administration of justice in all foreign countries with which it may be at peace. It is hoped that the answer of the German government may soon be communicated, and that it will be such as shall evince a willingness to reciprocate the very liberal and efficient provisions made in this country to enable Germany in case of need to obtain the evidence of witnesses in this country in any suit in which that government may be interested, and that the facilities which Mr. von Bulow says that Germany will afford in this direction may

ceiving the same, the said minister or consul shall indorse thereon a certificate, stating when and where the same was received, and that the said deposition is in the same condition as when he

prove ample and efficacious." (Mr. Fish, Sec. of State, to Mr. Davis, Nov 14, 1874. MSS. Inst. Germ., For. Rel., 1874. See further, Mr. Fish to Mr. Davis, April 7, 1875.)

"(On the 16th of November last I had the honor to receive your note of the 13th of that month, communicating an instruction which the imperial foreign office had directed to you, in reference to the objections which had been interposed by the German government to the obtaining of the testimony of certain parties resident in Germany, to be used in a suit pending in this country in behalf of the government of the United States against the German house of S. N. Wolff & Co. Although the instruction amounts to a courteous but practical denial to the customary practice under the legal system of the United States of the facilities whereby their courts are accustomed to seek the evidence on which they are to determine the contested rights submitted to them in the administration of justice, still I am bound to recognize the right of a sovereign State to deny such facilities, within its limits, to the courts of another State. At the same time it is hoped that, on a review of the question, it will be perceived that no invasion of the sovereign rights of a government, no harm to its dignity, and no inconvenience to its citizens or to its officers or its tribunals can result from an extension of comity that will allow to the judicial system prevailing in this country and in England the exercise of that mode of seeking the facts involved in a litigation pending in their courts which the experience of a long series of years has shown to be the more convenient, the less expensive, and wholly free from interference with the supreme rights of a State. The instruction, substantially but not perfectly, presents the system prevailing in this country, derived mainly from the 'common-law' system of England, for the attainment of the facts and the truth of any case to be judicially decided. The government with us lends its aid, so far as it can do it practically, to

the eliciting of the facts of every case with respect to which its courts are called upon to determine and administer justice; and believing that a full knowledge of the truth, as contested between litigants, is essential to the administration of justice, it grants as an act of courtesy, as well as of justice, the power to compel the attendance of witnesses, and requires them to testify under oath in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest. It allows the testimony to be taken either under a commission or letters rogatory, as the judicial procedure of such foreign country, or its policy, may dictate and prescribe, in its own forms of the administration or pursuit of justice, and in either case it affords to such friendly government the means whereby to obtain the evidence which is sought from witnesses within its limits. Its own citizens equally with resident aliens are made amenable to its process, in aid of such friendly power seeking to recover what it may consider to be due to it, in money or property, by the evidence which those citizens or aliens may be supposed able to furnish. I subjoin hereto an abstract from the statutes of the United States on this point. These facilities have been voluntarily extended by the United States to the governments with which it is in amity, in full knowledge and because of the fact so correctly and forcibly presented in the despatch of Mr. von Bulow, that they cannot be enjoyed except under such limitations and restrictions as may be provided by treaty stipulations, or (as in the case with the United States) are prescribed by the legal system in force in each country. They are a voluntary contribution on the part of the United States to the comity of nations and to the administration of justice, and toward the attainment of the rights of every other power with which they are at peace. The facilities thus given to friend-

received it; and he shall thereupon transmit the said letter or commission so executed and certified by mail, to the clerk of the court from which the same issued, in the manner in which his

ly powers, in suits in which such powers are parties or are interested, are, by the judicial practice of these several States, generally or largely accorded also in suits in which individuals, citizens, or subjects of such States are parties, and have been and are constantly availed of by Germans as well as individuals of other nationalities. With regard to the proceedings in the case in which the United States were endeavoring to obtain testimony in a suit wherein it was seeking to recover a large amount supposed to have been fraudulently withheld by a German house, the commission was addressed to consuls, not in their official capacity as consuls, but because of their being known, and of the assurance of a probability of their presence at or near the points where the witnesses were residing. They had no authority to attempt the compulsory attendance of any witness. The commission was issued with the expressed assent of the counsel representing the defendants in the suit; there was no attempt to extend what are termed 'the exceptional privileges granted to consuls of the United States by the consular treaty between Germany and America,' nor 'to limit the operation of the laws' of the country in which the commission was to be executed; and the assent of the attorneys of the defendants to the issuing of the commission, and the provision for taking testimony on behalf of the defendants, and for the presence of the counsel of the parties if desired, anticipated the objection stated by Mr. von Bulow, that German law allows the parties to be represented at the examination. I observe that Mr. von Bulow remarks that they 'objected not so much to the taking of sworn testimony by American consuls in their official capacity, as on general principles to the actual examination of witness by American commissioners within the limits of the German empire.' I have stated that there was no desire or attempt to take testimony 'by American consuls in their official capacity.' Mr. von Bulow states that, in the present case, 'now

pending in the southern district court at New York, the German courts, in whose districts the persons to be examined as witnesses reside, will immediately comply with any request that may be addressed to them by the aforesaid American court, and American commissioners, or any other duly authorized representative of the parties, will be at liberty to be present at all times fixed by the competent German courts, and to put to the witnesses, through the presiding judges, any questions to which an answer under oath may be important or desirable for the decision of the court of New York.'

"This is confined to one pending suit; whereas the previously cited objection was 'on general principles to the actual examination of witnesses by American commissioners,' and makes it desirable to know whether the objection 'on general principles' will be enforced in case the administration of justice in the courts of the United States shall in some other case find itself in need of the evidence of witnesses residing in Germany. The intelligent minister of Germany to the United States is aware of the multitudinous cases arising from the intimate commercial and social relations happily existing between the two countries, and of the consequent frequency of cases in which the testimony of parties residing in either country is essential to the determination of rights in the other, and will therefore appreciate the importance of an understanding of the limitations which either State may impose upon the other in the attainment of legal evidence. He is aware, also, of the promptness and of the facility with which legal evidence is furnished by the United States, in response to the frequent requests made therefor by all foreign powers, to determine the fact, the date, or the circumstances of the death of parties in the United States, to determine successions or other questions of interest to the citizens or subjects of such powers, or to the powers themselves. The agents and officers of the government are freely and

official despatches are transmitted to the government. And the testimony of witnesses so taken and returned shall be read as evidence on the trial of the suit in which it was taken, without

cheerfully employed to obtain the evidence desired, which is furnished as an act of international comity; and in no instance has the application been obstructed on the ground that it must be made through the courts of this country, or has any internal legal system been interposed as an objection to the request made. If the German government decide that in no other form than that of 'requisitions,' analogous to the cumbrous forms known to the common law of England as 'letters rogatory' (which are recognized by the laws of the United States because of their being known to the laws and the practice of some other countries), will it allow the evidence of witnesses residing in the German empire to be taken for use in suits pending in the United States, the latter do not contest the right to impose such limitation. It seems, however, to the United States that such limitation is in restraint of the administration of justice, by a constrained subjection of the proceedings in the courts of one country to the judicial system of another perhaps at entire variance in its forms of procedure, and especially in its mode of examining witnesses; and that the principle so aptly stated by Mr. von Bulow, that 'the courts of all the countries are bound to assist each other in the execution of law and the attainment of justice,' is but partially enforced when the legal system of *one country* limits and confines the search for only the truth in the administration of justice under the judicial system of another, to the technical formalities of its own. The experience of the United States since its existence as an independent power, of the practical working of the system which prevails in this country, and also in England, of affording every facility for the obtaining of the evidence of witnesses when without the actual jurisdiction of the court in which is pending the suit wherein their testimony is important, by means of commissions rather than by letters rogatory, attests the greater convenience of the former, and the entire absence of any resulting

danger to the parties litigant, to the witnesses, or to the State. The evidence thus obtained is taken in the form suited to the judicial system of the court which is to pass upon it, while much expense and delay is generally avoided. It is hoped that the German government may see fit to relax (what is recognized as within the abstract right of every government) the rigid rule of confining the courts of the United States, in search of testimony needed from witnesses in Germany, to its own tribunals as the only channel through which it is to be obtained. Should it, however, be desired to adhere to the course indicated by Mr. von Bulow, the courts in the United States should be apprised of the rigidity of the rule, which will (as in the case which has given rise to this correspondence) be apt to arrest the course of justice, owing to the unadvised adoption of the system of commissions which obtain so generally, and which has hitherto been supposed to be free from the objections of any government." (Mr. Fish, Sec. of State, to Mr. Schlozer, Dec. 9, 1874, MSS. Notes, Germany, For. Rel., 1875.)

"While under our practice, both in the Federal and State courts, it is certainly true that a commission is the usual, perhaps the universal, means in general use of obtaining the testimony of a witness in a foreign country, it is probably too broad a statement to say that none of our courts can make use of letters rogatory. Such question may in many cases be regulated by statute in the States, but it is true that letters rogatory are both executed by and issued from the Federal courts from time to time, and probably also from the State courts. Letters rogatory have, I think, been actually issued from the district courts in New York in the case of Wolff, which gave rise to this question, and since the question arose. Sections 875, 4071, 4072, 4073, 4074, of the Revised Statutes, contain provisions on the question" (Mr. Fish, Sec. of State, to Mr. Davis, June 8, 1875, MSS. Inst., Germ.)

objection as to the method of returning the same.”³ The statutes further provide for the taking of testimony under a commission or in pursuance of letters rogatory issued from a court in a foreign country, with which the United States are at peace, to take the testimony of a witness residing within the United States, in any suit for the recovery of money or property depending in such foreign court in which the government of such foreign country is a party or has an interest, as follows: —

“The testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony, together with specific written interrogatories, accompanying the same and addressed to such witness, shall have been issued from the court in which such suit is pending, on producing the same before the district judge of any district where the witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. And no witness shall be compelled to appear or to testify under this section except for the purpose of answering such interrogatories so issued and accompanying such commission or letters: *Provided*, That when counsel for all the parties attend the examination, they may consent that questions in addition to those accompanying the commission or letters rogatory may be put to the witness, unless the commission or letter rogatory exclude such additional interrogatories. The summons shall specify the time and place at which the witness is required to attend, which place shall be

As to letters rogatory from a United States Court to a Brazilian court, see Mr. Cadwalader, Assistant Secretary of State, to Mr. Partridge, Aug. 3, 1875 (MSS. Inst., Brazil.) See further, Mr. Frelinghuysen, Secretary of State, to Mr. von Schaeffer, March 29, 1883 (MSS. Notes, Austria); Mr. Frelinghuysen to Mr.

Morton, Dec. 19, 1884 (MSS. Inst., France).

As to letters rogatory from abroad to take the testimony of persons in prison in the United States, see Mr. Frelinghuysen, Secretary of State, to Mr. Sargent, June 27, 1883 (MSS. Inst., Germ.).

³ U. S. R. S. § 875.

within one hundred miles of the place where the witness resides or shall be served with such summons.”⁴ It has been held that criminal proceedings,⁵ and “proceedings relating to the investigation as to the smuggling of some cases of cotton,”⁶ do not come within this statute.

“No witness shall be required, on such examination or any other under letters rogatory, to make any disclosure or discovery which shall tend to criminate him either under the laws of the State or Territory within which such examination is had, or any other, or any foreign state.”⁷

“If any person shall refuse or neglect to appear at the time and place mentioned in the summons issued in accordance with section forty hundred and seventy-one, or, if upon his appearance he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offence on the trial of a suit in the district court of the United States.”⁸

“Every witness who shall so appear and testify shall be allowed, and shall receive from the party at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States.”⁹

“When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts.”¹⁰

⁴ U. S. R. S. § 4071.

⁵ *Matter of the Spanish Consul*, 1 Benedict, 225.

⁶ *In re Letters Rogatory*, 36 Fed. R. 306.

⁷ U. S. R. S. § 4072.

⁸ U. S. R. S. § 4073.

⁹ U. S. R. S. § 4074.

¹⁰ U. S. R. S. § 875, as amended by 19 St. at L. 241 (U. S. R. S. 1 Supp. 266).

CHAPTER XX.

DISMISSING BILLS OTHERWISE THAN AT A HEARING.

§ 291. **Dismissal of Bills by the Plaintiff.**—The plaintiff may dismiss his bill without costs at any time before the defendant's appearance.¹ He may obtain the order for the dismissal as of course upon motion or petition, usually by the latter;² but if the dismissal is a violation of an agreement between him and the defendant, the order granting it may be subsequently vacated.³ After appearance and before a decree or decretal order, a plaintiff can usually obtain a dismissal upon payment of the costs of such of the defendants as have appeared;⁴ but not, if they or any of them would be injured thereby.⁵ Leave to dismiss may be refused where the defendant claims affirmative relief by cross-bill, or by answer in a case where he is entitled to affirmative relief on an answer.⁶ For example, where the bill was filed to enforce a false claim to property or an instrument, which the evidence showed had been obtained by fraud, in which case the defendant without filing a cross-bill would be entitled if successful to a decree declaring the plaintiff's claim unfounded, and enjoining him from again setting it up;⁷ or where the bill was filed to set aside a patent on the ground of interference, when the defendant may obtain affirmative relief by answer.⁸ Leave may be granted upon terms, as for example, that the complainant stipulate to allow defendant's evidence to be used in any subsequent suit.⁹ An executor or other person, who has filed a bill in a representative

§ 291. ¹ *Thompson v. Thompson*, 7 Beav. 350.

² *Daniell's Ch. Pr.* (5th Am. ed.) 790, 791.

³ *Betts v. Barton*, 3 Jur. (N. S.) 154.

⁴ *C. & A. R. R. Co. v. Union Rolling Mill Co.*, 109 U. S. 702; *Conn. & P. R. R. Co. v. Henshaw*, 27 Fed. R. 678.

⁵ *Cooper v. Lewis*, 2 Phil. 178; *Ainslie v. Sims*, 17 Beav. 174; *Booth v. Leycester*, 1 Keen, 247; *Bank of South Carolina v. Rose*, 1 Rich. Eq. (S. C.) 292; *Stevens v. The Railroads*, 4 Fed. R. 97.

⁶ *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. R. 602; *C. & A. R. R. Co. v. Rolling Mill Co.*, 109 U. S. 702; *Stevens v. The Railroads*, 4 Fed. R. 97; *Hat Sweat Manuf. Co. v. Waring*, 46 Fed. R. 87.

⁷ *Stevens v. The Railroads*, 4 Fed. R. 97; *Hat Sweat Manuf. Co. v. Waring*, 46 Fed. R. 87; *supra*, § 171.

⁸ *Electrical Accumulator Co. v. Brush Electric Co.*, 44 Fed. R. 602; *supra*, § 171.

⁹ *American Zylonite Co. v. Celluloid Manuf. Co.*, 32 Fed. R. 809.

capacity in good faith with reasonable grounds for so doing, may be excused payment of costs.¹⁰ The motion for such an order should be upon notice.¹¹ These rules apply when a plaintiff sues in behalf of himself and others, provided that no one has previously joined with him as co-plaintiff,¹² unless, perhaps, others have contributed to the expenses of the suit and wish it continued.¹³ After other members of the class have joined as co-plaintiffs in the suit, the plaintiff cannot dismiss the bill without their consent.¹⁴ The majority of the stockholders in a corporation cannot always have a suit discontinued against the wishes of its directors.¹⁵ After a decree or decretal order, the plaintiff may not discontinue without the consent of all parties who have acquired rights by the decree.¹⁶ The usual course pursued by one, in whose name without his consent a bill has been filed, is to move to have it taken off the file.¹⁷ Upon this being done, he may recover from the solicitor who filed the bill,¹⁸ his costs, as well as any costs he may have been compelled to pay a defendant. A plaintiff cannot, it seems, dismiss a part only of his bill. The proper course is for him to amend by omitting it.¹⁹ When there is more than one plaintiff, one of them may by special leave of the court have the bill dismissed with costs so far as concerns himself, provided that no injury will thereby result to any other party.²⁰ If there are several defendants, a plaintiff may obtain an order dismissing his bill as to some of them, provided that no injury will be thereby done the rest.²¹ A dismissal at the plaintiff's request before a hearing is usually without prejudice,²² unless evidence has been taken and the cause set down for a hearing, when it may be only granted by a decree dismissing the bill upon the merits.²³ The entry of an order of discontinuance

¹⁰ *Arnoux v. Steinbrenner*, 1 Paige (N. Y.), 82.

¹¹ *American Zylonite Co. v. Celluloid Manuf. Co.*, 32 Fed. R. 809.

¹² *Handford v. Storie*, 2 Sim. & S. 196; *Armstrong v. Storer*, 9 Beav. 277.

¹³ *Ex parte Railroad Co.*, 95 U. S. 221; *Miller v. Liggett & M. Tobacco Co.*, 7 Fed. R. 91.

¹⁴ *Belmont Nail Co. v. Columbia Iron & Steel Co.*, 46 Fed. R. 336.

¹⁵ *Railway Company v. Alling*, 99 U. S. 463.

¹⁶ *Guilbert v. Hawles*, 1 Ch. Cas. 40; *Carrington v. Holly*, 1 Dickens, 280.

¹⁷ *Palmer v. Walesby*, L. R. 3 Ch. App. 732.

¹⁸ *Palmer v. Walesby*, L. R. 3 Ch. App. 732; *Wright v. Castle*, 3 Meriv. 12.

¹⁹ *Camden & Amboy R. R. Co. v. Stewart*, 4 C. E. Green (N. J.), 69.

²⁰ *Holkirk v. Holkirk*, 4 Madd. 50; *Winthrop v. Murray*, 7 Hare, 150.

²¹ *Baily v. Lambert*, 5 Hare, 178.

²² *Daniell's Ch. Pr.* (5th Am. ed.) 793. But see *Stevens v. The Railroads*, 4 Fed. R. 97; and § 300.

²³ *Rumbly v. Stainton*, 24 Ala. 712; *Rochester v. Lee*, 1 Macn. & G. 467. See *Stevens v. The Railroads*, 4 Fed. R. 97.

upon consent of both parties amounts in effect to a dismissal of the bill.²⁴ The dismissal of a bill or of part of a bill does not authorize the removal of the paper from the clerk's office unless the order so directs; and such a direction will rarely be given.²⁵ Otherwise, the paper remains a part of the record, and may be used as evidence of any admission therein contained.²⁶

§ 292. **Dismissal of Bills for want of Prosecution.** — A defendant is entitled to an order dismissing the plaintiff's bill: if the plaintiff does not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed, or on the next succeeding rule-day, unless the time within which to do either of those things has been enlarged by a judge of the court;¹ if the plaintiff does not reply to that defendant's answer on or before the next succeeding rule-day after its filing, provided that no exceptions have been taken to the answer, or that any exceptions filed are still undecided, or that the cause is not set down for a hearing on bill and answer;² and possibly if no testimony is taken by the plaintiff within three months after the cause is at issue,³ or within any shorter time that may be assigned by the court;⁴ although it might be held that in such a case the defendant must first set the cause down for a hearing. The plaintiff's time for doing any of these things may, however, be enlarged, either before or after it has expired, by the court or by consent at any time;⁵ and the taking of any subsequent step by the defendant in the cause, before attempting to take advantage of the default, will usually be deemed a waiver of it.⁶

§ 293. **Dismissal for want of Jurisdiction.** — The Judiciary Act of 1875 provides that "if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute

²⁴ *Pictet Artificial Ice Co. v. N. Y. Ice Machine Co.*, 12 Fed. R. 816.

²⁵ *Lyster v. Stickney*, 12 Fed. R. 609, 610.

²⁶ *Lyster v. Stickney*, 12 Fed. R. 609, 610.

§ 292. ¹ Rule 38.

² Rule 66. *Reynolds v. First National Bank*, 112 U. S. 405.

³ Rule 69; *Adams v. Howard*, 21 Off.

Gaz. 264. For the practice in the Southern District of New York, see *infra*, § 296.

For a case where the delay was held excusable, see *Beirne v. Wadsworth*, 36 Fed. R. 614.

⁴ Amendment of 1869 to Rule 67.

⁵ Rules 38, 66, 69; *Ex parte Poulney v. City of Lafayette*, 12 Pet. 472.

⁶ *Allen v. Mayor*, 7 Fed. R. 483; *Jackson v. Ivimey*, L. R. 1 Eq. 693.

or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.”¹ The court should do this of its own motion, as soon as it discovers its want of jurisdiction or the improper or collusive joinder.² The Supreme Court has said that this provision of the Act of 1875 is salutary, and that it is the duty of the Circuit Courts to exercise their power under it in all proper cases.³ Neither party has the right, however, without pleading it within the time allowed for that purpose, to introduce evidence to contradict averments of the jurisdictional facts.⁴ If, however, from any source the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may of its own motion cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition.⁵ In such a case the party that sought the jurisdiction of the Federal court should have an opportunity to be heard on the motion, and to meet it by appropriate evidence.⁶ A judge cannot thus dismiss or remand a case upon his personal conviction, although it amounts to a moral certainty; the collusion or lack of jurisdiction must be legally proved.⁷ If there is no collusion and an original defect in the jurisdiction has been cured before the objection is raised, it seems that the suit will be retained.⁸ Before the Act of 1875, it was held that a defendant, between whom and the complainant the requisite difference of citizenship existed, could not raise an objection on account of the citizenship of another defendant.⁹ It has been said, that a

§ 293. ¹ Act of March 3, 1875, ch. 137, § 5 (18 St. at L. 472). See *supra*, § 18, and *infra*, § 393.

² *Williams v. Nottawa*, 104 U. S. 209.

³ *Williams v. Nottawa*, 104 U. S. 209, 212.

⁴ *Hartog v. Memory*, 116 U. S. 588, 590-592; *Deputron v. Young*, 134 U. S. 241.

⁵ *Hartog v. Memory*, 116 U. S. 588, 590-592.

⁶ *Hartog v. Memory*, 116 U. S. 588, 590-592.

⁷ *Barry v. Edmunds*, 116 U. S. 550, 559.

⁸ *Pacific Railroad v. Ketchum*, 101 U. S. 289, 299.

⁹ *Harrison v. Urann*, 1 Story, 64; *Pond*

defect in the jurisdiction of the Circuit Court for the Southern District of New York, because the cause of action arose in the Northern District of that State, may be taken by answer as well as by plea, but unless raised somewhere in the pleadings will be waived.¹⁰ If the record does not show affirmatively that the court has jurisdiction, the case may be dismissed at any time after as well as before judgment; and the objection may be taken for the first time in the appellate court.¹¹ No party can offer evidence to controvert an allegation of a jurisdictional fact in a pleading or petition for removal, unless he has, by plea or answer, preferably by plea, denied such allegation.¹² Consent cannot confer jurisdiction;¹³ but it has been held that consent may bind the parties and waive a previous lack of jurisdiction, if, when the attention of the court is called to the defect, jurisdiction has been obtained.¹⁴ The court may of its own motion, at any time, irrespective of the pleadings, direct an inquiry as to whether the jurisdictional facts exist.¹⁵ Upon such an inquiry the plaintiff or a defendant who has removed the case is entitled to appear by counsel, and offer evidence in support of the jurisdiction.¹⁶ No judge has the right to dismiss a suit under this statute upon his personal conviction, however strong, unless the facts on which his conviction is based appear upon the record, and create a legal certainty of the conclusion derived from them.¹⁷ Where a plaintiff had acquired the causes of action which he sought to enforce, solely for the purpose of collection in the Federal courts under an agreement to pay back a certain proportion of the net proceeds to his assignors, who could not have sued therein, it was held that the suits should be dismissed.¹⁸ When after all the pleadings are filed in a suit which

v. Vermont Valley R. R. Co., 12 Blatchf. 280.

¹⁰ *Black v. Thorne*, 10 Blatchf. 66.

¹¹ *Grace v. American Central Insurance Company*, 109 U. S. 278; *Börs v. Preston*, 111 U. S. 252; *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379.

¹² *Hartog v. Memory*, 116 U. S. 588; *Davies v. Lathrop*, 13 Fed. R. 565; *Cuthbert v. Galloway*, 35 Fed. R. 466; *Deputron v. Young*, 134 U. S. 241.

¹³ *People's Bank v. Calhoun*, 102 U. S. 256.

¹⁴ *Pacific Railroad v. Ketchum*, 101 U. S. 280, 298.

¹⁵ *Hartog v. Memory*, 116 U. S. 588; *Morris v. Gilmer*, 129 U. S. 315.

¹⁶ *Hartog v. Memory*, 116 U. S. 588, 590-592; *Barry v. Edmunds*, 116 U. S. 550.

¹⁷ *Barry v. Edmunds*, 116 U. S. 550, 559; *Deputron v. Young*, 134 U. S. 241, 252.

¹⁸ *Farmington v. Pillsbury*, 114 U. S. 138; *Williams v. Nottawa*, 104 U. S. 209; *Bernards Township v. Stebbins*, 109 U. S. 341; *New Providence v. Halsey*, 117 U. S. 336; *Little v. Giles*, 118 U. S. 596; *Norton v. European & N. Am. Ry. Co.*, 32 Fed. R. 865.

was brought in or removed to a Federal court, on the claim that it is a case arising under the Constitution and laws of the United States, it appears that the averments upon which the jurisdiction is claimed are immaterial, it is the duty of the court to dismiss or remand the cause.¹⁹ To justify a dismissal under this statute, the court must be satisfied that the object was to create a case cognizable in the Federal courts.²⁰ Where a collusive transfer of the cause of action was evidently made for another purpose, it was held that the jurisdiction should be retained.²¹ Admissions by the defendant after a suit is brought cannot by reducing the matter in dispute divest the court of jurisdiction.²² A dismissal upon this ground should be without prejudice.²³ A motion to dismiss for want of equity can only be made at a hearing.²⁴ A motion to dismiss for want of jurisdiction of the Federal court may be made at any time.²⁵ "Such an objection ought to be raised at the first opportunity, and delay in its presentation should be considered in examining into the grounds upon which it is alleged to rest."²⁶

§ 294. Dismissal for Failure to perfect or revive a Suit. — When a suit has abated or become otherwise defective before a decree, the party or parties against whom it can be continued may, upon notice served upon the person or persons entitled to revive or supply the defect in the same, move for and obtain an order, directing that these revive or supply the defect, within a certain limited time to be fixed by the court, or that else the bill be dismissed.¹ If the suit abate by the death of one of several plaintiffs, the order may be obtained against the survivors; and it seems that the objection that there is no personal representative of the deceased plaintiff will not prevent the court from granting such an order.² It is irregular in such cases to move to dismiss a bill for want of prosecution; and an order to that

¹⁹ *Robinson v. Anderson*, 121 U. S. 522. See *infra*, § 393.

²⁰ *Lanier v. Nash*, 121 U. S. 404, 410; *Manhattan Life Ins. Co. v. Broughton*, 109 U. S. 121.

²¹ *Lanier v. Nash*, 121 U. S. 404.

²² *Fuller v. Met. Life Ins. Co.*, 37 Fed. R. 163.

²³ *Thompson v. Railroad Companies*, 6 Wall. 134; *Kendig v. Dean*, 97 U. S. 423; *Van Norden v. Morton*, 99 U. S. 378; *Williams v. Nottawa*, 104 U. S. 209.

²⁴ *La Vega v. Lapsley*, 1 Woods, 428; *Betts v. Lewis*, 19 How. 72; *Fuller v. Metropolitan Life Ins. Co.*, 31 Fed. R. 696.

²⁵ *La Vega v. Lapsley*, 1 Woods, 428. But see *Fuller v. Metropolitan Life Ins. Co.*, 31 Fed. R. 696.

²⁶ *Deputron v. Young*, 134 U. S. 241, 251.

§ 294. ¹ *Adamson v. Hall*, 1 Turner & Russ. 258; *Bolton v. Bolton*, 2 Sim. & S. 371.

² *Hinde v. Morton*, 2 H. & M. 368.

effect, if obtained, will be discharged for irregularity.³ A bill may be dismissed at a defendant's motion for the plaintiff's failure to serve with process another defendant named in the bill who is a necessary party to the suit.⁴

§ 295. **Election.** — When the plaintiff is suing both at law and in equity, at the same time, for the same matter, the defendant is entitled to an order that the plaintiff elect whether he will proceed in equity or at law.¹ The case of a mortgagee is an exception to this rule; for, in the absence of any statutory restriction, he can proceed at the same time to foreclose his mortgage in equity and sue on the bond at law.² This exception, however, it has been held in England, does not extend to the case of a vendor seeking to enforce his lien and sue at law for his debt.³ In a special case, the plaintiff may be allowed to proceed partially at equity and partially at law, and compelled to make a special election.⁴ The principle of election has been extended to a case where the plaintiff sued at once in both a foreign and a domestic court.⁵ The defendant cannot move for the order until after he has answered, and the time for exceptions has expired without one being taken, or the answer has been adjudged sufficient.⁶ A joint plea and answer is not, it seems, sufficient to enable a defendant to obtain such an order.⁷ The order should allow the plaintiff a reasonable time within which to make his election.⁸ The plaintiff may move to discharge the order for irregularity in obtaining it, or upon the merits confessed in the answer or proved in an affidavit.⁹ If, upon such a motion, any doubt arises as to whether the suit in equity and the action at law are for the same matter, it is customary to direct an inquiry into that fact;¹⁰ during the progress of which, all proceedings in

³ *Robinson v. Norton*, 10 Beav. 484; *Anon.*, 1 Vern. 104; *Franklin v. Hersch*, 3 Tenn. Ch. 467.
Boddy v. Kent, 1 Meriv. 351; *Sellers v. Dawson*, 2 Dickens, 738.

⁴ *Jessup v. Illinois Cent. R. Co.*, 36 Fed. R. 735; *Picquet v. Swan*, 5 Mason, 561.

§ 295. ¹ *Mitford's Pl.* (Tyler's ed.) 340; *Carlisle v. Cooper*, 3 C. E. Green (N. J.), 241; *Livingston v. Kane*, 3 J. Ch. (N. Y.) 224.

² *Booth v. Booth*, 2 Atk. 343; *Dunkley v. Van Buren*, 3 J. Ch. (N. Y.) 330.

³ *Barker v. Smark*, 3 Beav. 64.

⁴ *Barker v. Dumaesque*, 2 Atk. 119;

⁵ *Pieters v. Thompson*, G. Cooper, 294.

⁶ *Mitford's Pl.* (Tyler's ed.) 340; *Leicester v. Leicester*, 10 Simons, 87.

⁷ *Fisher v. Mee*, 3 Meriv. 45; *Soule v. Corning*, 11 Paige (N. Y.), 412.

⁸ *Bracken v. Martin*, 3 Yerg. (Tenn.) 55; *Rogers v. Vosburgh*, 4 J. Ch. (N. Y.) 84.

⁹ *Daniell's Ch. Pr.* (2d Am. ed.) 817.

¹⁰ *Mouseley v. Basnett*, 1 Ves. & B. 382 n.

both courts are usually stayed,¹¹ unless the plaintiff can show that justice will be better done by permitting proceedings to some extent, when he may by special leave continue in one or both, at the court's discretion.¹² If the plaintiff require further time within which to make his election, he should apply for it to the court by motion upon notice.¹³ At the expiration of the time allowed him he must make his election, which is usually done by filing a written statement of it signed by him or his solicitor in the clerk's office;¹⁴ or else his bill will be dismissed.¹⁵ If he elect to proceed in equity, his proceedings at law are stayed by the order,¹⁶ and either the defendant will be allowed to recover the costs of the action, or the plaintiff will be directed by the court of equity to pay them.¹⁷ If the plaintiff elect to proceed at law, his bill in equity will be dismissed with costs.¹⁸ Such a dismissal will, however, be no bar to a subsequent suit.¹⁹

¹¹ *Mills v. Fry*, 3 Ves. & B. 9; *Anon.*, 2 Madd. 395; *Daniell's Ch. Pr.* 817.

¹² *Amory v. Brodrick*, Jacob, 530; *Carwick v. Young*, 2 Swanst. 239.

¹³ *Daniell's Ch. Pr.* (5th Am. ed.) 817.

¹⁴ *Daniell's Ch. Pr.* (5th Am. ed.) 817.

¹⁵ *Daniell's Ch. Pr.* (5th Am. ed.) 816; *Boyd v. Heinzelman*, 1 Vesey & Beames, 381.

¹⁶ *Daniell's Ch. Pr.* (5th Am. ed.) 816.

¹⁷ *Simpson v. Sadd*, 16 C. B. 26; *Carwick v. Young*, 2 Swanst. 239.

¹⁸ *Jones v. Earl of Strafford*, 3 P. Wms. 79, 90, n. B.

¹⁹ *Countess of Plymouth v. Bladon*, 2 Vern 32; *Livingston v. Kane*, 3 J. Ch. (N. Y.) 224; *Rogers v. Vosburgh*, 4 J. Ch. (N. Y.) 84.

CHAPTER XXI.

THE HEARING.

§ 296. **Bringing a Suit to a Hearing.**—The old practice of bringing a suit to a hearing was by the plaintiff's procuring an order to set it down for hearing within four weeks after the closing of the evidence; upon his failure to do which a defendant might either set it down himself, or move to dismiss the bill for want of prosecution. The party setting it down was obliged to sue out a subpoena to hear judgment, and have the same served upon the solicitors of the other parties.¹ If a plaintiff wished to set a cause down for a hearing upon bill and answer, he was obliged to do so within the time allowed him for filing the replication.² The practice upon this subject in the United States courts is, however, very loose,—some circuits following the analogy of the English practice; some regulating the matter by rule; and some adopting by custom a practice very similar to that of the courts of the State where the circuit is held.³ Calendar practice in the several circuits is usually modelled on the State practice in that respect. In the Southern District of New York, the rules provide that, "Issues, whether of law or fact, and appeals, in this court, may be noticed for trial or hearing, and placed upon the calendar, by either party; and either party noticing the same may, when the cause shall be called, move the trial or hearing, and take verdict or judgment, or order to dismiss the suit for not going to trial, as the court shall direct."⁴ "When no proceedings are taken by either party within thirty days after replication, for the examination of witnesses out of court, either party may set the cause down for hearing upon the pleadings."⁵ If an original and a cross cause have been set down for hearing at differ-

§ 296. ¹ Daniell's Ch. Pr. (5th Am. ed.) 963-971; 3 Bl Com 450.

² Daniell's Ch. Pr. (5th Am. ed.) 964, 965

³ By statute, a preference is given in all circuits and in the Supreme Court to actions in which a State is a party or in which the execution of the revenue laws

of a State is enjoined. U. S. R. S. § 949; *Ward v. The State*, 12 Wall. 163; *Hoge v. R. & D. R. R. Co.*, 93 U. S. 1; *Davenport City v. Dows*, 15 Wall. 390; *Miller v. The State*, 12 Wall. 159.

⁴ U. S. C. C., S. D. N. Y., Rule of Jan. 14, 1871.

⁵ U. S. C. C., S. D. N. Y., Rule 109.

ent times, and other causes intervene, the plaintiff in whichever of them is below the other will usually upon motion obtain leave to bring it forward, so that both causes may be heard together.⁶ Where one defendant has demurred and another filed a plea, it is the usual practice to postpone the hearing upon the plea until the demurrer has been determined.⁷ A hearing will not be given upon an agreed statement of facts without pleadings,⁸ even if a State statute authorizes such a practice.⁹

§ 297. **Manner of hearing a Cause.** — The formal mode of hearing a cause where all parties appear upon its being called on, has been thus described. “The leading counsel for the plaintiff opens the plaintiff’s case, and in so doing states, first the bill, and then the answers, if any: pointing out the matters in issue, and the questions in equity arising therefrom; after which the plaintiff’s evidence is read, either by his leading or his junior counsel, and their arguments in support of the case are adduced. The counsel for the defendant are then heard, in support of the defendant’s case, and his evidence is read by them; and the plaintiff’s senior counsel is then heard in reply. When all are heard, the court pronounces the decree, either immediately or at a subsequent day.”¹ It is usual here, however, to waive the reading, and for counsel to state merely the substance of the pleadings and testimony, which are submitted to the judge at, or shortly after, the conclusion of the oral arguments, with written arguments upon the law and the facts, called briefs or points. The course is much the same where the cause is set down for a hearing upon bill and answer. The pleadings only are then read, and the answer is admitted to be true in all its allegations of fact,² even when not stated positively, and the defendant only avers that he believes and hopes to be able to prove such facts.³ But the plaintiff does not thereby admit conclusions of law, nor allegations as to matters concerning which the court takes judicial notice.⁴ No other evidence is permitted except matters of record to which the

⁶ Hinde’s Pr. 415; 3 Blackstone’s Commentaries, 451.

⁷ *Campbell v. Mayor of New York*, 33 Fed. R. 795.

⁸ *Nickerson v. Atchison*, T. & S. F. R. Co., 30 Fed. R. 85; s. c. 1 McCrary, 383.

⁹ *Nickerson v. Atchison*, T. & S. F. R. Co., 30 Fed. R. 85; s. c. McCrary, 383; *supra*, § 6.

§ 297. ¹ Daniell’s Ch. Pr. (5th Am. ed.) 1988.

² 3 Bl. Com. 1448; *Tainter v. Clark*, 5 Allen (Mass.), 66; *Parker v. Town of Concord*, 39 Fed. R. 718.

³ *Brinckerhoff v. Brown*, 7 J. Ch. (N. Y.) 217; *Dale v. McEvers*, 2 Cowen (N. Y.), 118.

⁴ *Taylor v. Barclay*, 2 Simons, 213. See *supra*, § 106.

answer refers.⁵ It has been said that a judge may hear a cause in which he was retained before he received his judicial appointment;⁶ but the almost universal practice is for a judge to refuse to sit in such a case.

§ 298. **Rules of Decision upon a Hearing.** — All decisions made in a former stage of the cause are open for review upon the final hearing.¹ But if the evidence is unchanged, a judge will rarely refuse to follow a ruling made by one of his colleagues in the same² or a similar³ case. Greater respect is paid to a ruling by the Circuit Justice than to one by the Circuit Judge;⁴ and a ruling by the Circuit Judge has more weight than one by a District Judge. In matters of substantive as distinguished from adjective law, that is, of the law creating rights but not of that merely regulating practice, the Federal courts are — certainly so far as property in land is affected thereby, and probably altogether — bound by and will follow the statutes of the State within whose jurisdiction is the property that is the subject of the suit.⁵ A State statute, however, which is merely declaratory of the law cannot affect the rules applying to causes of action which arose before its enactment.⁶ Whether a State statute has been properly passed so as to take effect, is a question of law, in determining which the courts of the United States will follow the decisions in the State wherein it is claimed to be in force.⁷ So, too, in construing a statute or the Constitution of a State, the Federal courts will in general follow the construction put upon it by the State courts, "when that construction has been settled by the decisions of its highest tribunal."⁸ Even if, be-

⁵ *Anon*, 1 Barb. Ch. (N. Y.) 73.

⁶ *Thelsson v. Rendlesham*, 7 H. L. C. 429; *The Richmond*, 9 Fed. R. 863; and citations.

§ 298. ¹ *Fourniquet v. Perkins*, 16 How. 82; *Pulliam v. Pulliam*, 10 Fed. R. 53. But see *Coupe v. Weatherhead*, 37 Fed. R. 16.

² *Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.*, 1 Saw. 685; *Wakelee v. Davis*, 44 Fed. R. 532.

³ *Worswick Manuf. Co. v. City of Philadelphia*, 30 Fed. R. 625. But see *Northern P. R. Co. v. Sanders*, 47 Fed. R. 504.

⁴ *Preston v. Walsh*, 10 Fed. R. 315. But see *United States v. Huggell*, 40 Fed. R. 636, 644.

⁵ *Watts v. Waddle*, 6 Pet. 389; *McGoon v. Scales*, 9 Wall. 23; *Gaines v. Fuentes*, 92 U. S. 10; *Brine v. Insurance Co.*, 96 U. S. 627; *Pulliam v. Pulliam*, 10 Fed. R. 53, 77. See *infra*, § 375.

⁶ *Town of Koshkonong v. Burton*, 104 U. S. 668.

⁷ *Town of South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Supervisors*, 105 U. S. 667; *Leeper v. Texas*, 139 U. S. 462.

⁸ *Polk's Lessee v. Wendal*, 7 Cranch, 87; *Nesmith v. Sheldon*, 7 How. 812; *Walker v. State Harbor Commissioners*, 17 Wall. 648; *Township of Elmwood v. Marcy*, 92 U. S. 289; *Township of East Oakland v. Skinner*, 94 U. S. 255; *Louisville, N. O. & T. Ry. Co. v. Mississippi*, 133

fore the State courts have construed it, a State statute is given one construction by a Federal court, and subsequently the highest court of the State construes it differently; or if the Federal court have first construed it in ignorance of its construction by the highest tribunal of the State,—the Federal courts will, in subsequent cases, disregard their former ruling and follow that of the State court.⁹ It has been even held that the Federal courts will not investigate the claim that the decision of the State court was obtained by collusion between the parties to the case in which it was obtained.¹⁰ The courts of the United States are not bound by a decision of a State court construing a statute which is claimed to be a contract by the State; since otherwise the clause in the national Constitution forbidding a State to pass a law impairing the obligations of contracts might be violated with impunity.¹¹ And, for a similar reason, if different constructions have been given to the same statute or constitutional provision by the courts of a State at different times, the Federal courts are not “bound to follow the later decisions, if thereby contract rights which have accrued under earlier rulings will be injuriously affected.”¹² Otherwise, said Chief Justice Taney, “the provision of the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory.”¹³ It seems that the Federal courts will give to a right created by a well-recognized local custom established and acquiesced in within a State, the same force as if it had been created by a State statute.¹⁴ In deciding questions of general commercial law, however, upon which the statutes of a State are silent, the Federal courts are not bound by the decisions of the State courts, but decide according to their own views of what the law is and should be.¹⁵ In one case, where the rule of the

U. S. 587; *Peters v. Bain*, 133 U. S. 670; *Case v. Kelly*, 133 U. S. 21.

⁹ *Fairfield v. County of Gallatin*, 100 U. S. 47. But see *Burgess v. Seligman*, 107 U. S. 20; and *infra*, § 375.

¹⁰ *Township of East Oakland v. Skinner*, 94 U. S. 255.

¹¹ *Jefferson Branch Bank v. Skelly*, 1 Black, 436. See *Railroad Co. v. Falconer*, 103 U. S. 821, 822.

¹² Chief Justice Waite in *Douglass v. County of Pike*, 101 U. S. 677, 686. See

also *Rowan v. Runnels*, 5 How. 134; *Ohio Life Ins. & Tr. Co. v. Debolt*, 16 How. 416; *Gelpcke v. Dubuque*, 1 Wall. 175, *Thompson v. Perrine*, 103 U. S. 806.

¹³ *Rowan v. Runnels*, 5 How. 134.

¹⁴ *Swift v. Tyson*, 16 Pet. 1, 18; *Gaines v. Fuentes*, 92 U. S. 10; *Railroad Co. v. National Bank*, 102 United States, 14, 29. See *supra*, § 7.

¹⁵ *Swift v. Tyson*, 16 Pet. 1; *Carpenter v. The Providence Washington Ins. Co.*, 16 Pet. 495, *Oates v. National Bank*, 100

Federal was different from that of the State courts, Judge McCrary followed the latter, since otherwise there was a probability that a party to the suit would be subjected to a double payment.¹⁶

§ 299. **Objections which cannot be made at the Hearing.** — As the provisions of the equity rules and the other regulations of practice are chiefly designed to facilitate the speedy and orderly progress of a cause to a hearing, after a cause has been brought to a hearing it is a general rule that no objections as to form or the delay in taking a previous proceeding will be allowed to be taken then for the first time.¹ Thus, the rules provide that “if a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.”² “Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk’s order-book in the form or to the effect following, (that is to say); ‘Set down upon the defendant’s objection for want of parties.’ And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant’s objection shall then be allowed, be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.”³ An amended bill filed without leave upon the day of the hearing may be disregarded by the court.⁴ It seems that a plea stating a mere conclusion of law or a plea unaccompanied by the proper certificate of counsel and affidavit of the defendant, may also be disregarded.⁵ Advantage may, however, be taken of

U. S. 239; *Railroad Company v. National Bank*, 102 U. S. 14; *Butler v. Douglass*, 3 Fed. R. 612. See *Burgess v. Seligman*, 107 U. S. 20. See *infra*, § 375.

Constible v. Keeley, 7 Fed. R. 447.

§ 299. ¹ *Allen v. Mayor, &c. of N. Y.*, 12 Blatchf. 239.

² Rule 53.

³ Rule 52.

⁴ *Terry v. McLure*, 103 United States, 442.

⁵ *National Bank v. Insurance Co.*, 104 U. S. 54.

the laches of the plaintiff by a defendant who has not pleaded it.⁶ The objection that the allegations in the bill show no ground for the interference of a court of equity may be taken at any time.⁷ The objection that the plaintiff has an adequate remedy at law is waived by the defendant unless raised in a demurrer, plea, or answer; but may be taken by the court at any time.⁸

§ 300. **Action of the Court upon a Hearing.** — The court may upon the hearing of a cause either decide all the questions raised therein and make a final decree, or merely dispose of some of them and give directions to facilitate the decision of those which remain. If the court inclines in favor of the defendant, it will usually render a final decree dismissing the bill. The dismissal may be absolute or without prejudice. An absolute decree of dismissal is an absolute bar to any subsequent suit brought for the same cause.¹ A dismissal without prejudice is no bar to another suit brought for the same cause of action, provided that the defects on account of which the bill was dismissed are remedied.² A dismissal without prejudice is usually ordered when a bill is dismissed for want of parties,³ or for want of jurisdiction in a Federal court,⁴ or for multifariousness,⁵ or for "a slip or mistake in the pleadings or in the proof."⁶ The Supreme Court will reverse a decree which dismissed a bill absolutely when the dismissal should have been without prejudice.⁷ If on the other hand the court inclines in favor of the plaintiff, unless the bill pray merely for a perpetual injunction, it rarely renders a final decree at the first hearing of the cause. It often directs a reference to a master to take accounts or assess damages;⁸ and it not infrequently gives leave to either party to apply for further orders or

⁶ *Baker v. Biddle*, Baldwin, 394.

⁵ *Williams v. Jackson*, 107 U. S. 478,

⁷ *Baker v. Biddle*, Baldwin, 394; *Quir- 484.*
olo v. Ardito, 1 Fed. R. 610.

⁸ *Reynes v. Dumont*, 130 U. S. 352; *Kilburn v. Sunderland*, 130 U. S. 505. See *supra*, § 110.

§ 300. ¹ *Case v. Beauregard*, 101 U. S. 688; *Durant v. Essex Company*, 7 Wall. 107.

² *Walden v. Bodley*, 14 Pet. 156, 161; *Daniell's Ch. Pr.* (5th Am. ed.) 994, 995; *Rosse v. Rust*, 4 J. Ch. (N. Y.) 300.

³ *Kendig v. Dean*, 97 U. S. 423.

⁴ *Hartell v. Tilgham*, 99 U. S. 547, *Gaylords v. Kelshaw*, 1 Wall. 81.

⁶ *Daniell's Ch. Pr.* (2d Am. ed.) 994, 995; *McNeill v. Cahill*, 2 Bligh, 228; *Woollam v. Hearn*, 7 Ves. 211, 222; *Rosse v. Rust*, 4 J. Ch. (N. Y.) 300. For example, when the bill showed a good ground of equitable relief as to one plaintiff, but failed to show what interest the other had in the subject-matter of the litigation. *House v. Mullen*, 22 Wall. 42. But see *Ogsbury v. LaFarge*, 2 N. Y. 113; and § 291.

⁷ *House v. Mullen*, 22 Wall. 42.

⁸ See Chapter XXIII.

directions "at the foot of the decree" which it orders entered.⁹ Under such a clause the court will usually listen to no further applications, except as to matters concerning which directions were contained in the decree first entered. Thus, it has been held that it will not under such a clause entertain an application to set aside a sale made under a decree.¹⁰ If the court is in doubt concerning the facts, it may direct a feigned issue, or an action at law, or a reference to a master, to aid it in determining the same. In one case, when a bill had been filed by a bondholder praying for the appointment of a receiver of a canal company, the court at the hearing denied the application for a receiver, but retained the bill so far as to compel the corporation to file an annual account.¹¹

⁹ *Legrand v. Whitehead*, 1 Russ. 309 ;
Wetmore v. St. Paul & P. R. R. Co., 3
Fed. R. 177. But see *Hughes v. Jones*, 3
De G. F. & J. 307.

¹⁰ *Wetmore v. St. Paul & P. R. R. Co.*,
3 Fed. R. 177.

¹¹ *Stewart v. Chesapeake & Ohio Canal
Co.*, 5 Fed. R. 149.

CHAPTER XXII.

ISSUES AT LAW.

§ 301. **Power of Courts to direct Issues at Law.**—When the chancellor was in doubt concerning any question of fact arising in the cause, the evidence in regard to which was conflicting or insufficient,¹ it was his custom to compel its trial before a jury upon a feigned issue; and, if their verdict was satisfactory to him, to assume the truth of the facts established by the same as the basis of his decree.² This power of the chancellor is also vested, independently of any special statute, in all the courts of the United States which have equitable jurisdiction;³ but in cases arising under the patent laws it has been increased by a recent statutory enactment, providing that the Circuit Courts of the United States, “when sitting in equity for the trial of patent causes, may impanel a jury of not less than five and not more than twelve persons, subject to such general rules in the premises as may from time to time be made by the Supreme Court,⁴ and submit to them such questions of fact arising in such cause as such circuit court shall deem expedient; and the verdict of such jury shall be treated and proceeded upon in the same manner and with the same effect as in the case of issues sent from chancery to a court of law and returned with such findings.”⁵ The court may at any time decide a cause without a trial of an issue which it has ordered, and even without revoking its previous order directing one.⁶ The order of a judge directing an issue at law is discretionary, and it is doubtful whether or not it may be reviewed upon appeal.⁷ It was formerly an almost invariable custom to direct an issue when the question to be determined was

§ 301. ¹ *Moons v. De Bernales*, 1 Russ. 301; *Burkett v. Randall*, 3 Mer. 466.

² 3 Bl. Com. 452.

³ *Harding v. Handy*, 11 Wheat. 103; *Goodyear v. Providence Rubber Co.*, 2 Cliff. 351; *Johnson v. Harmon*, 94 U. S. 371, 378.

⁴ No rules upon this subject have hitherto been made.

⁵ 18 St. at L. ch. 77, p. 315; 1st Supp. U. S. R. S. 136; *Watt v. Starke*, 101 U. S. 247.

⁶ *Field v. Holland*, 6 Cranch, 8; *Cook v. Bay*, 4 How. (Miss.) 485.

⁷ See *Black v. Lamb*, 1 Beasley (N. J.), 108; *Ward v. Hill*, 4 Gray (Mass.), 593; *Crittenden v. Field*, 8 Gray (Mass.), 621.

the validity of a will as against an heir, or the true heir-at-law of a decedent, or the right of a rector to tithes.⁸ It was very common, moreover, when an allegation in a sworn answer, the plaintiff not having waived answer under oath, was only controverted by the testimony of a single witness supported by corroborating circumstances;⁹ or when, by determining in the way he inclined, the judge would find a person guilty of forgery.¹⁰ It seems to be the opinion of Judge Hammond that it is the duty of a Federal court of equity to direct an issue at law of a common-law claim against a receiver.¹¹ An issue may be directed notwithstanding a report of auditors upon the facts.¹² The court sometimes directs only a single issue, and sometimes several, according to the number of substantial points upon which it deems it necessary to take the opinion of a jury; and it will, when the question to be decided embraces several disputed circumstances, direct an issue upon each of them.¹³ If the parties cannot agree upon the form of an issue, it will be settled either by the judge or by a master, as the court deems most expedient.¹⁴ By going to trial upon an issue neither party is precluded from any right he may have to afterwards appeal from the order directing it.¹⁵

§ 302. **Matters concerning which an Issue is directed.**—No party will be permitted to take an issue in a different form from that which he has stated in his pleadings;¹ but the court may upon its own motion direct an issue to try a matter not in issue arising upon the hearing, and which it thinks should be determined before a final decree is rendered.² An issue also may be directed upon claims brought in under a decree by persons not upon the record.³ An issue will not, however, be directed to establish a point which a party set up in his pleading but omitted in his proof.⁴

⁸ 3 Bl. Com. 452; Lord Fingal v. Blake 1 Molloy, 113; Vaigneur v. Kirk, 2 Desaus. (S. C.) 640; Williams v. Price, 4 Price, 156, 160.

⁹ Daniell's Ch. Pr. ch. xxvi. § 1.

¹⁰ Bishop of Winchester v. Fournier, 2 Ves. Sen. 445, 446; Apthorp v. Comstock, 2 Paige (N. Y.), 482. But see Peake v. Highfield, 1 Russ. 559.

¹¹ Atkins v. Wabash Ry. Co. (Ward, Intervenor), 41 Fed. R. 193; quoted, *supra*, § 251.

¹² Field v. Holland, 6 Cranch, 8.

¹³ Bryan v. Parker, 1 Younge & C. 170;

Bailey v. Sewell, 1 Russ. 239; Earl of Newburgh v. Countess, 5 Madd. 364.

¹⁴ Daniell's Ch. Pr. ch. xxvi. § 1.

¹⁵ White v. Lisle, 3 Swanst. 342; Legare v. Daly, 1 Ves. Sen. 192; De Tastet v. Bordenave, Jacob, 516.

§ 302. ¹ St. Paul's v. Kettle, 2 V. & B. 1; Bennett v. Neale, Wightw. 324; Savage v. Carroll, 1 Ball & B. 548.

² Balch v. Tucker, 2 Ch. Cas. 40.

³ Price v. Price, cited in 2 Smith's Ch. Pr. 76.

⁴ Savage v. Carroll, 1 Ball & B. 548; Price v. Berrington, 3 Macn. & G. 486.

§ 303. **Time when an Issue is directed.** — According to the old practice an issue was rarely directed before the original hearing of a cause.¹ Instances have occurred, however, when this has been done before that time upon motion,² and even to determine the facts upon a motion for an injunction or a receiver, when the affidavits for or against the motion were conflicting.³ An issue has been often granted after the original hearing at a hearing for further directions;⁴ and even afterwards.⁵ It has been said that, in the Federal courts, an order for an issue should not be made until all the proofs have been taken and publication has passed.⁶ Under the statute providing for the direction of issues in patent causes, it would seem that one can now be directed by an interlocutory order more frequently than formerly.⁷

§ 304. **Manner of trying an Issue.** — The manner of trying a feigned issue is thus described by Blackstone. "But, as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the court of King's bench, or at the assizes upon a *feigned issue*. For (in order to bring it there, and have the point in dispute, and that only, put in issue) an action is brought, wherein the plaintiff, by a fiction, declares that he laid a wager of 5*l.* with the defendant that A was heir at-law to B; and then avers that he is so; and therefore demands the 5*l.* The defendant admits the feigned wager, but avers that A is not the heir to B, and thereupon that issue is joined, which is directed out of chancery to be tried; and thus the verdict of the juror at law determines the fact in the court of equity. These feigned issues seem borrowed from the *sponsio judicialis* of the Romans: and are also frequently used in the courts of law, by consent of the parties, to determine some disputed right without the formality of pleading, and thereby to save much time and expense in the decision of a cause."¹ The legal fiction is, however, now practically out of use; and issues are tried upon

§ 303. ¹ Fullagar v. Clark, 18 Ves. 481.

² Middleton v. Sherburne, 4 Y. & C. 358; Kent v. Burgess, 11 Simons, 361; Townley v. Deare, 3 Beav. 213; Lancashire v. Lancashire, 9 Beav. 259.

³ Gardiner v. Rowe, 4 Madd. 236; De-Tastet v. Bordenave, Jacob, 516

⁴ New Orleans, G. L. & B. Co. v. Dudley, 8 Paige (N. Y.), 452.

⁵ Price v. Price, cited in 2 Smith's Ch. Pr. 76.

⁶ Goodyear v. Providence Rubber Co., 2 Fisher's Pat. Cas. 499.

⁷ 18 St. at L. ch. 77, p. 315; 1st Supp. U. S. R. S. 136.

§ 304. ¹ 3 Bl. Com. 452.

the common-law side of a Circuit or District Court frequently by the same judge that directed them.² The course of proceeding upon the trial of an issue is substantially the same as that in ordinary trials at common law, unless the judge who directed it has given special directions upon the subject.³ When, however, a will was sought to be proved against an heir-at-law, at the suit of a devisee, it was necessary by the former practice to prove the execution of the will by examining all the witnesses who were alive and capable of giving testimony.⁴ If the order for an issue direct that a number of witnesses be examined, but the plaintiff declines to call some, the judge himself will call and examine the rest.⁵ It seems, too, that the jury should be sworn in the words of the order of issue.⁶ The order of issue, however, usually contains directions as to admissions to be made and documents to be produced by the parties.⁷ No admission of any fact not clearly admitted by the pleadings will, however, be required.⁸ If such directions are omitted in the order for the issue, they may be obtained afterwards upon motion.⁹ The party upon whom the burden of proof rests, whether he be plaintiff or defendant in the original suit, is directed by the order to act as plaintiff in the issue.¹⁰ It is the defendant's duty to name an attorney to appear for him at the trial of the issue. If he fail to do so, it has been held that an order may be obtained directing that he name an attorney in four days, or else that the issue be taken as tried and a verdict given for the plaintiff.¹¹ The decree or order for the issue should specify a time when it is to be tried.¹² If the plaintiff make default in having the case ready for trial at the appointed time,¹³ or either party fail then to appear, the court will order the issue taken *pro confesso* against him, unless he can show a reasonable ground for a postponement.¹⁴ It seems,

² See *Wilson v. Riddle*, 123 U. S. 608.

³ See *Kerr v. South Park Commissioners*, 117 U. S. 379; *Wilson v. Riddle*, 123 U. S. 608.

⁴ *Townsend v. Ives*, 1 Wilson, 216; *Ogle v. Cook*, 1 Ves. Sen. 177; *Bullen v. Michel*, 2 Price, 399; *Bootle v. Blundell*, 19 Ves. 494.

⁵ *Groom v. Chambers*, 2 Mont. & Ayr. 742.

⁶ *Wilson v. Barnum*, 1 Wall. Jr. 242.

⁷ *Duke of Beaufort v. Morris*, 2 Phil. 683; *Apthorp v. Comstock*, 2 Paige

(N. Y.), 482; *Cart v. Hodgkin*, 3 Swanst. 161.

⁸ *Duke of Beaufort v. Morris*, 2 Phil. 683.

⁹ *Marsh v. Sbbald*, 2 V. & B. 375.

¹⁰ *Parker v. Morrell*, 2 Phil. 453.

¹¹ *Wilson v. Ginger*, 2 Dick. 521; *Hartland v. Dancocks*, 5 De G. & Sm. 561.

¹² *Daniell's Ch. Pr. ch. xxvi. § 1.*

¹³ *Bearblock v. Tyler*, 1 J. & W. 225; *Casborne v. Barsham*, 5 M. & C. 113.

¹⁴ *Casborne v. Barsham*, 5 M. & C. 113; *Hargrave v. Hargrave*, 8 Beav. 289.

that an application for a postponement,¹⁵ or for a special jury, if one be desired,¹⁶ should be made to the judge who directed the issue. A person interested in the result of an issue, but who refuses to be a party to it, may be allowed to attend the trial by counsel, in which case he may be compelled to produce documents material to the case and in his possession.¹⁷ After the trial, the trial judge certifies how the verdict was found, but judgment should not be entered upon it.¹⁸ If any special circumstances have occurred at the trial which he thinks it right to report to the court, he indorses the *postea*.¹⁹ He may also furnish to the court of equity a description of the trial.²⁰ An irregularity or omission in this respect may, however, be corrected or disregarded.²¹

§ 305. *Effect of the Finding of a Jury upon an Issue.* — “The verdict of a jury upon an issue out of chancery is only advisory and never conclusive upon the court. It is intended to inform the conscience of the Chancellor. It may be disregarded, and a decree rendered contrary to it.”¹ If, therefore, either party be dissatisfied, he must move for a new trial on the equity and not on the common-law side of the court;² “and for that purpose the party applying for a new trial must procure notes of the proceedings and of the evidence given at the trial for the use of the Chancellor. This is done either by moving the Chancellor to send to the judge who tried the issue, for his notes of trial; or procuring a statement of the same in some other proper way. The Chancellor then has before him the evidence given to the jury, and the proceedings at the trial, and may be satisfied, by an examination thereof, that the verdict ought not to be disturbed. The evidence and proceedings then become a part of the record, and go up to the court of appeal if an appeal is taken.”³ Unless such a motion is made, no error committed in the course of the trial of the issue can be reviewed upon

¹⁵ *Kebel v. Philpot*, 9 Simons, 614.

¹⁶ *Anon.*, 2 P. Wms. 68. As to depositions, see *Cahoon v. Ring*, 1 Clifford, 592.

¹⁷ *Pindar v. Smith*, Mad. & Geld. 48.

¹⁸ *Kerr v. S. Park Comm.*, 117 U. S. 379.

¹⁹ *White v. Lisle*, 3 Swanst. 342; *Trenton Baking Co. v. Russell*, 1 Green Ch. (N. J.) 492.

²⁰ *Bassett v. Johnson*, 1 Green Ch. (N. J.) 154.

²¹ *Wilson v. Riddle*, 123 U. S. 608.

§ 305. ¹ Mr. Justice Bradley in *Watt v. Starke*, 101 U. S. 247, 252. See also *Basey v. Gallagher*, 20 Wall. 670; *Allen v. Blunt*, 3 Story, 742, 746.

² *Watt v. Starke*, 101 U. S. 247, 250; *Johnson v. Harmon*, 94 U. S. 371, 378.

³ Mr. Justice Bradley in *Watt v. Starke*, 101 U. S. 247, 250, 251. See also *Johnson v. Harmon*, 94 U. S. 371.

appeal.⁴ Such an application should be made by motion or petition before the cause comes on for hearing upon further directions.⁵ The form of an issue cannot, however, be changed in this manner. A party desiring to alter it must do so by presenting a petition for a rehearing of the decree or order directing it.⁶ The manner in which the verdict is reviewed in equity is thus described by Lord Eldon: "In considering whether, in such a case as this, the verdict ought to be disturbed by a new trial, allow me to say that this court, in granting or refusing new trials, proceeds upon very different principles from those of a court of law. Issues are directed to satisfy the judge, which judge is supposed, after he is in possession of all that passed upon the trial, to know all that passed there; and looking at the depositions in the cause, and the proceedings both here and at law, he is to see whether, on the whole, they do or do not satisfy him. It has been ruled over and over again, that if, on the trial of an issue, a judge reject evidence which ought to have been received, or receive evidence which ought to have been refused, though in that case a court of law would grant a new trial, yet if this court is satisfied, that if the evidence improperly received had been rejected, or the evidence improperly rejected had been received, the verdict ought not to have been different, it will not grant a new trial merely upon such grounds."⁷ The usual grounds for directing a new trial of an issue are, "1st, the alleged improper summing up of the judge; 2dly, because the weight of evidence is against the verdict; and 3dly, because of an informality in the evidence."⁸ Surprise and fraud are also reasons for granting a new trial.⁹ When the dispute concerns the title to land, in imitation of courts of law two trials of the issue have often been granted, when the first verdict was satisfactory upon the evidence;¹⁰ and sometimes the court has directed a second trial for the solemn determination of the matter, without setting aside the first verdict, the effect

⁴ *Brockett v. Brockett*, 3 How. 691; *Johnson v. Harmon*, 94 U. S. 371; *Watt v. Starke*, 101 U. S. 247.

⁵ *Attorney-General v. Montgomery*, 2 Atk. 378; *Van Alst v. Hunter*, 5 J. Ch. (N. Y.) 148, 152.

⁶ *Daniell's Ch. Pr.* (3d American ed.) 1114.

⁷ Lord Eldon in *Barker v. Ray*, 2 Russ. 63. See also *Bootle v. Blundell*, 19 Ves.

494; *Tatham v. Wright*, 2 Russ. & M. 1; *Watt v. Starke*, 101 U. S. 247, 252.

⁸ *Smith's Ch. Pr.* (Phila. ed.) vol. ii. p. 84. See also *Tatham v. Wright*, 2 Russ. & M. 1; *Watt v. Starke*, 101 U. S. 247, 253.

⁹ *Exton v. Turner*, 2 Ch. Cas. 80; *Stan-den v. Edwards*, 1 Ves. Jr. 133.

¹⁰ *Earl of Darlington v. Bowes*, 1 Eden, 271; *Stace v. Mabbot*, 2 Ves. Sen. 552.

of which was that the first verdict was admitted in evidence upon the second trial, and had its weight with the jury.¹¹ In such case, the court usually made it a condition of granting a second trial, that the applicant should pay to the other party the costs of the first.¹²

§ 306. *Proceedings after the Trial of an Issue.* — After the trial of an issue and the completion of the record by the addition of the *postea*, the cause, unless a new trial is obtained, should be set down for hearing.¹ This may be done in the usual manner; but it seems, not before the expiration of the first four days of the term following the trial, in order that the party against whom the verdict has been found may have an opportunity of moving for a new trial.² The cause then comes on in the regular course, when such final or other decree as is proper is pronounced. The costs of an issue do not follow the verdict as a matter of course, but are in the discretion of the court which directed the issue;³ though they are usually given to the party in whose favor the verdict was rendered.⁴ In one case the court ordered an advance out of a fund in its possession, in order to enable the parties to try an issue directed by it.⁵

¹¹ *Baker v. Hart*, 3 Atk. 542.

³ *Decker v. Caskey*, 2 Green Ch. (N. J.)

¹² *Baker v. Hart*, 3 Atk. 542; *Edwin v.* 446.

Thomas, 1 Vern. 489.

⁴ *Corporation of Rochester v. Lee*, 2

§ 306. ¹ *Allen v. Blunt*, 3 Story, 742; *De G. M. G.* 427.

Daniell's Ch. Pr. ch. xxvi.

⁵ *Coombs v. Brooks*, 3 DeG. & S. 454.

² 1 *Newland's Ch. Pr.* 357.

CHAPTER XXIII.

PROCEEDINGS IN A MASTER'S OFFICE.

§ 307. **References to Masters in General.**—The labors of a judge of a court of equity are often materially lightened by referring the consideration of matters of fact to a master in chancery, who is directed by it to investigate the same and report his opinion thereon to the court. Certain ministerial acts which a court of equity undertakes are also performed by it through a master. The matters which are ordinarily referred to masters in chancery are inquiries, as to whether pleadings or other proceedings in a suit in equity contain impertinence or scandal; as to who are the heirs, next of kin, creditors, or members of a particular class of legatees of a person whose estate is in the hands of the court for distribution; as to whether the title to real estate is good; as to the state of the law of a foreign country; as to whether one of two books or other publications is pirated from the other; as to the amount of damage suffered by the granting or withholding of an injunction; the taking of accounts; the computation of interest; the settlement of conveyances, and other deeds; the selling of property; the appointment of trustees, receivers, and guardians; and the superintendence of the performance of their duties by receivers. The extent of a master's authority is limited by the decree or order appointing him;¹ and it has been said that it cannot be extended even by consent.² The rules provide that "every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding undisposed of, unless the court shall otherwise direct."³

§ 307. ¹ *Lonsdale Co. v. Moies*, 2 Cliff. R. R. of Iowa, 2 Fed. R. 656; *Gordon v. Hobart*, 2 Story, 243.

² *Farmers' L. & Tr. Co. v. Central*

³ Rule 73.

§ 308. **Who may be appointed Master.** — The Circuit Courts, “both the judges concurring in the appointment,” have the power to appoint standing masters in chancery in their respective districts.¹ A Circuit Court may also appoint a master *pro hac vice* in any particular case.² A recent statute provides that “no clerk of the district or circuit courts of the United States, or their deputies, shall be appointed a receiver or master in any case, except where a judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment.”³ It has been held at circuit that this statutory prohibition is for the benefit of the parties to the litigation, and may be waived by their consent to an order appointing such an officer master in a particular case; and that after such an order or decree has thus been entered and the parties have proceeded before the master, it may be amended by the insertion of a clause stating that the court has determined “that such consent is a sufficient special reason for such appointment.”⁴ Another statute provides that “no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to be employed by such court or judge in any office or duty in any court of which such justice or judge may be a member.”⁵

§ 309. **Bringing on a Reference.** — The rules provide that, whenever a reference is made, the party at whose instance or for whose benefit it was directed must bring the same to a hearing on or before the rule-day next succeeding the date of the order for a reference.¹ Otherwise, the adverse party may forthwith cause proceedings to be had before the master at the costs of the party who procured the reference.² The master need not report evidence unless required by either party.³ It is the master’s duty, as soon as he reasonably can after the matter referred to him is brought before him, to assign a time and place for proceeding, and to give due notice thereof to each of the parties, or their solicitors.⁴ Notice may be served by mail or otherwise.⁵ It

§ 308. ¹ Rule 82. ² Rule 82.

³ 20 St. at L. ch. 183, p. 415.

⁴ *Fischer v. Hayes*, 22 Fed. R. 92.

⁵ 24 St. at L. p. 552, ch. 373, § 7.

§ 309. ¹ Rule 74.

² Rule 74.

³ *Union Sugar Refinery v. Mathiesson*,

3 Cliff. 146, 149. See *Kerosene Lamp Heater Co. v. Fisher*, 1 Fed. R. 91.

⁴ Rule 75.

⁵ *Kerosene Lamp Heater Co. v. Fisher*, 1 Fed. R. 91.

need not be served by the marshal.⁶ By the old English practice parties interested in the subject-matter of a reference were brought before the court by the service of a warrant. This was a memorandum, upon a slip of paper entitled in the cause, and signed by the master, appointing a day and hour for all parties concerned to attend him on the matter of the reference.⁷ It was in substantially the following form: "By virtue of an order of reference, I do appoint to consider the matters thereby to me referred, on — next, at — of the clock, in the — noon, at my Chambers in —, at which time and place all parties concerned are to attend. [Signature.] Dated the — day of —, —." ⁸ It is a better practice, however, for the warrant to contain a statement of the nature of the reference.⁹ This warrant is often called a "summons."¹⁰ There was required to be at least one clear day between the day of issuing the warrant and the day appointed by it for the attendance of the parties thereon.¹¹ The warrant was obtained from the master's clerk by the solicitor applying for it; and the latter underwrote a memorandum expressing its object, and saw that due service of it was made.¹² Whenever a document of any kind was left at the master's office by the solicitor of either of the parties, he usually took out a warrant, which he underwrote, "on leaving the," &c.¹³ This was termed a "warrant on leaving," and was served in the usual manner, but was considered a mere formal notice, to afford the opposite party an opportunity of obtaining a copy of the document left that he might either admit or contest the circumstances there stated, as he might be advised.¹⁴

§ 310. **Parties entitled to attend a Reference before a Master.** — The general rule appears to be, that all parties beneficially interested, either in the estate or in the fund or matter in question, are entitled to attend before the master on all those proceedings which may affect their interests, or increase or diminish their proportion in the fund.¹ The only exception to this rule is said to be the case of a reference to a master of the title to an estate

⁶ *Kerosene Lamp Heater Co. v. Fisher*, 1 Fed. R. 91.

⁷ *Daniell's Ch. Pr. ch. xxvi.*

⁸ *Daniell's Ch. Pr. ch. xxvi.*

⁹ *Manhattan Co. v. Everton*, 4 Paige, (N. Y.) 276.

¹ *Manhattan Co. v. Everton*, 4 Paige, (N. Y.) 276.

¹¹ 1 *Newland's Chan. Pr.* 324. See *Bernie v. Vandever*, 16 Ark. 616.

¹² *Daniell's Ch. Pr. ch. xxvi.*

¹³ *Daniell's Ch. Pr. ch. xxvi.*

¹⁴ *Daniell's Ch. Pr. ch. xxvi.* See *Manhattan Co. v. Everton*, 4 Paige (N. Y.), 276.

§ 310. ¹ *Daniell's Ch. Pr. ch. xxvi.* See *Johnson v. Waters*, 111 U. S. 640.

purchased under a decree, when the vendor's solicitor only has the right to appear before the master on the inquiry.² An executor, as the legal representative of his testator, is entitled to attend on all proceedings relating to the charges of creditors seeking payment out of the personal estate; but after there has been a report of debts, if all the persons interested in the personal estate are before the court the executor is only entitled to attend on those proceedings in which he is personally interested as an accounting party.³ Trustees were formerly not allowed (except in proceedings carried on by themselves) to attend before the master in cases where all the beneficiaries were before the court; but if there were any persons *in esse*, or who might "come into *esse*," who might become interested and whose interests were only represented by the trustees, and were not too remote, the trustees were entitled to attend the proceedings affecting those interests.⁴ The rule that all parties interested in the result are entitled to attend before the master applies not only to those who are parties to the record, but to those who are "*quasi* parties," by having come in under the decree and established a claim.⁵ A party who has appeared, but allowed a decree to be taken against him by default for want of an answer, is, it seems, entitled to notice of the proceedings against him under the decree in the master's office; ⁶ but cannot appear upon such notice before the master without previously obtaining an order for that purpose, which is usually only granted upon terms.⁷ The proper course to test a party's right to attend before a master is, after the latter's refusal, to apply to the court by petition for an order permitting the party to attend before him.⁸

§ 311. **Proceedings before a Master in General.** — The rules give the master authority to regulate all the proceedings upon a reference to him.¹ In case of an abuse of his discretion by a master, any party aggrieved may apply to the court for an order, requiring the master to act properly; ² but such applications are

² Daniell's Ch. Pr. ch. xxvi.

³ Daniell's Ch. Pr. ch. xxvi.

⁴ Daniell's Ch. Pr. ch. xxvi.

⁵ Daniell's Ch. Pr. ch. xxvi.

⁶ *King v. Bryant*, 3 M. & C. 191; Daniell's Ch. Pr. ch. xxvi.

⁷ *Heyn v. Heyn*, Jacob, 49; Daniell's Ch. Pr. ch. xxvi.

⁸ Daniell's Ch. Pr. ch. xxvi.

§ 311. ¹ Rule 77.

² Daniell's Ch. Pr. ch. xxvi; *Bate Refrigerating Co. v. Gillette*, 28 Fed. R. 673; Rule 75. See *Re Thomas*, 35 Fed. R. 337, 340.

not encouraged,³ and are only granted in extraordinary cases.⁴ If any party fail to appear at the appointed time and place, the master may either proceed *ex parte*, or, in his discretion, may adjourn the proceedings.⁵ In the latter case, he should give notice of the adjournment to the party who failed to appear, or to his solicitor.⁶ It is the master's duty to proceed in the reference with all reasonable diligence and with the least practicable delay.⁷ Otherwise, either party may apply to the court or a judge thereof, for an order requiring the master to speed the proceedings and to make his report, and to certify to the court or judge the reasons for any delay.⁸ There is no necessity for the master's taking any oath, unless the order of reference especially requires him to do so.⁹ All parties who are required to account before a master must bring in their accounts in the form of debtor and creditor.¹⁰ Should a party fail to do so, the master may make an order requiring him to furnish such an account.¹¹ The order should not be granted till the first hearing of the reference.¹² The order must be served personally with a copy of this order and a notice of the day to which the hearing is adjourned.¹³ Service may be made by any disinterested person.¹⁴ If the defendant then fails to appear and account, he is in contempt.¹⁵ If any of the other parties is dissatisfied with the accounts rendered, he may examine the accounting party either orally or by interrogatories or by deposition, as the master directs.¹⁶ By the English practice, the time for a single hearing before a master did not usually exceed one hour, unless the master continued the hearing longer, when an increased fee might, it seems, be charged.¹⁷ It was the duty of the master or his clerk to mark in the master's book the names of the solicitors who attended, and no other attendance than those so marked was allowed in taxing costs.¹⁸ In the

³ Lull v. Clark, 20 Fed. R. 454; Wooster v. Gumbirner, 20 Fed. R. 167; Bate Refrigerating Co. v. Gillette, 28 Fed. R. 673.

⁴ Lull v. Clark, 20 Fed. R. 454; Wooster v. Gumbirner, 20 Fed. R. 167; Bate Refrigerating Co. v. Gillette, 28 Fed. R. 673.

⁵ Rule 75.

⁶ Rule 75.

⁷ Rule 75.

⁸ Rule 75.

⁹ Thompson v. Smith, 2 Bond, 320.

¹⁰ Rule 79.

¹¹ Kerosene Lamp Heater Co. v. Fisher, 1 Fed. R. 91.

¹² Kerosene Lamp Heater Co. v. Fisher, 1 Fed. R. 91.

¹³ Kerosene Lamp Heater Co. v. Fisher, 1 Fed. R. 91.

¹⁴ Kerosene Lamp Heater Co. v. Fisher, 1 Fed. R. 91.

¹⁵ Kerosene Lamp Heater Co. v. Fisher, 1 Fed. R. 91.

¹⁶ Rule 79.

¹⁷ Daniell's Ch. Pr. ch. xxvi.

¹⁸ Daniell's Ch. Pr. ch. xxvi.

Southern District of New York, a master is forbidden to adjourn a reference for more than ten days without the written consent of all the parties or the authorization of one of the judges.¹⁹

§ 312. **A State of Facts.**—By the English practice a party who intended to examine witnesses before a master under a decree was obliged to carry in a state of facts detailing the circumstances which he desired to prove.¹ This was also the general form by which the prosecution of every reference to a master was commenced.² “A state of facts, as its name imports, is a statement in writing, made by a party who wishes to prosecute or resist any inquiry before a master, of the facts and circumstances upon which he relies, either in support of his own cause, or in contradiction or defeasance of that of his adversary. It is, in effect, the pleading of the party before the master, and is governed by nearly the same rules and principles as pleadings in the Court, although, not being signed, nor, in general, prepared by counsel, they are not always so strictly observed. A state of facts, however, must be pertinent to the matter, and must not, any more than any other proceeding in the cause, contain any scandal, and if it is either scandalous or impertinent, the scandalous or impertinent matter may be expunged, in the manner which will be presently pointed out. A state of facts is intituled in the cause, and contains a detail of the facts and circumstances intended to be relied upon by the party: when the party carrying in the state of facts, makes any claim upon the fund in Court, it is usual to conclude the statement with the particulars of the claim, in the manner of a prayer for relief to the bill, as follows:—‘And the said A. B., therefore, claims, &c.’ in such case the proceeding is called ‘a state of facts and claims.’ When the object of the party is to charge another with the receipt of money, &c., the state of facts concludes with a charge in the following form:—‘and the said A. B., therefore, charges, &c.’ in such case the proceeding is called ‘a state of facts and charge.’ It may be remarked, that a charge is not always preceded by a state of facts, but if the matter appears from any admissions in any account, or examination or proceeding in the master’s office, and requires no other proof in support of it, it is usual to make ‘a charge’ only. When a state of facts is pre-

¹⁹ Rule 115 of United States C. C.,
S. D. N. Y.

§ 312. ¹ Daniell’s Ch. Pr. ch. xxvi.

² Daniell’s Ch. Pr. ch. xxvi.

pared, it is carried in to the master's office and a warrant 'on leaving' must be served upon the other parties, who may then apply for and obtain copies from the master's clerk, and if they have a counter state of facts to leave, they must proceed in the same manner. It is usual to add to a state of facts, a sort of petition, that the party may be at liberty to add to, alter, or vary the state of facts, as he may be advised; and it is presumed, that such form was originally considered necessary, to enable the party to amend his state of facts, after it has been delivered in. It is, however, now an unnecessary form, as a state of facts may be amended at any time, or a further state of facts carried in, upon leaving which, a warrant, 'on leaving,' should be taken out and served, as when an original state of facts is left."³

§ 313. **Evidence before a Master.** — "All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceedings in any cause or matter may be used before the master."¹ These should, however, be regularly offered in evidence, so that the other party may have an opportunity to explain or rebut them.² Otherwise, they cannot be referred to upon the argument, or used in support of the report.³ The master has power to examine under oath the parties in the cause, and any witnesses produced by them,⁴ and any creditor or other person coming in to claim before him.⁵ The evidence should be taken down in writing by the master, or some one in his presence, so that the court may use the same.⁶ Witnesses who live in the district may, upon due notice to the opposite party, be summoned to appear before a master, by a subpoena issued from the clerk's office in blank and filled by the party applying for the same, or by the master, requiring the attendance of the witnesses at a time and place therein specified.⁷ Such witnesses are entitled to the same compensation as for attendance in court.⁸ A refusal to appear in obedience to such a subpoena is a contempt punishable by the court or a judge thereof by an attachment issued upon the master's certificate.⁹ Upon the

³ Daniell's Ch. Pr. ch. xxvi.

§ 313. ¹ Rule 80. But see Hammacher v. Wilson, 32 Fed. R. 796.

² Bell v. U. S. Stamping Co., 32 Fed. R. 549.

³ Bell v. U. S. Stamping Co., 32 Fed. R. 549.

⁴ Rule 77.

⁵ Rule 81.

⁶ Rule 81.

⁷ Rule 78.

⁸ Rule 78.

⁹ Rule 77.

master's certificate a commission issues from the clerk's office to take the depositions of witnesses according to the acts of Congress or equity rules.¹⁰ Under extraordinary circumstances, a master may take testimony beyond the territorial jurisdiction of the court.¹¹ A master has power to direct the mode in which matters requiring evidence shall be proved before him.¹² The court¹³ may but rarely will interfere with the master's ruling in this respect before his report is brought before it for review.¹⁴

§ 314. **Masters' Reports and Compensation.** — The final decision of a master upon the matters referred to him is embodied in his report to the court. He is forbidden by the rules to recite at length any part of any paper or deposition brought in or used before him.¹ He is, however, required to refer to and identify every state of facts, charge, affidavit, deposition, examination, or answer used before him, so as to inform the court concerning the pleadings and evidence which he considered in reaching the conclusions embodied in his report.² It is the better practice for a master before making his report to prepare and serve on the parties a draft of the same, with notice of a time and place when and where he will hear their objections thereto.³ At the appointed time, counsel should appear, make their objections to the proposed report, and see that these objections are noted in writing and filed with the master.⁴ This is the practice in the Second Circuit.⁵ The practice is, however, in some circuits very loose in this respect.⁶ A master cannot retain his report as security for his compensation.⁷ His compensation is fixed by the court in its discretion with regard to the circumstances of each particular case.⁸ This compensation is charged upon and borne by such of the parties to the cause as the court shall direct.⁹ A master's compensation upon an accounting is usually imposed in

¹⁰ Rule 77.

¹¹ *Bate Refrigerating Co. v. Gillette*, 28 Fed. R. 673.

¹² Rule 77.

¹³ *Webster Loom Co. v. Higgins*, 43 Fed. R. 673.

¹⁴ *Lull v. Clark*, 20 Fed. R. 454; *Wooster v. Gumbirner*, 20 Fed. R. 167. § 314. ¹ Rule 76.

² Rule 76. See *In re Thomas*, 35 Fed. R. 337, 339.

³ *Fischer v. Hayes*, 16 Fed. R. 469; *Jennings v. Dolan*, 29 Fed. R. 861.

⁴ *Fischer v. Hayes*, 16 Fed. R. 469; *Story v. Livingston*, 13 Pet. 359.

⁵ *Fischer v. Hayes*, 16 Fed. R. 469; *Jennings v. Dolan*, 29 Fed. R. 861.

⁶ *Hatch v. Indianapolis & Springfield R. R. Co.*, 9 Fed. R. 856.

⁷ Rule 82.

⁸ Rule 82; *Erie Ry. Co. v. Heath*, 10 Blatchf. 214; *Middleton v. Bankers' & Merchants' Tel. Co.*, 32 Fed. R. 524.

⁹ Rule 82.

the first instance upon the accounting party.¹⁰ The order adjusting a master's compensation should name the party who is required to pay it, and a time within which payment is to be made.¹¹ Failure to comply with the order is punishable by attachment for contempt of court.¹² It seems, however, that payment pending a suit can only be compelled on the application of the master or his representative, not at the request of a party.¹³ As soon as the report is ready, the master should file the same in the clerk's office; and the clerk should enter the day of the return in the order book.¹⁴ If no exceptions are filed within one month from the time of filing, the report is considered as confirmed on the next rule-day after the month has expired.¹⁵

§ 315. **Exceptions to Masters' Reports.** — Exceptions to the report of a master must be filed within one month from the day when it was filed.¹ No exception will lie to any matter which was not objected to before the master.² In circuits, where it is not the practice for masters to serve drafts of their reports, an exception to the report, but not an exception to a ruling in evidence, can be filed without a preliminary objection.³ Such an exception has also been permitted after a draft of the report had been served, and no objection made thereto.⁴ Objections in support of exceptions may be allowed to be filed *nunc pro tunc*.⁵ Exceptions should specifically point out the errors of which they complain, and if they rely on any part of the testimony, it is the safer practice to have them either state the same or refer thereto, so that the court can without difficulty find it.⁶ "All that is ne-

¹⁰ *Urner v. Kayton*, 17 Fed. R. 539; *s. c.* 17 Fed. R. 845.

¹¹ Rule 82.

¹² Rule 82.

¹³ *Mallory Manuf. Co. v. Fox*, 20 Fed. R. 409.

¹⁴ Rule 83.

¹⁵ Rule 83; *Burns v. Rosenstein*, 135 U. S. 449, 455.

§ 315. ¹ Rule 83; *Fidelity Ins. & Safe Deposit Co. v. Shenandoah Iron Co.*, 42 Fed. R. 372. But see *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, *Hamilton Intervenor*, 27 Fed. R. 175.

² *Troy Iron & Nail Factory v. Corn- ing*, 6 Blatchf. 328; *Fischer v. Hayes*, 16 Fed. R. 469; *Story v. Livingston*, 13 Pet. 359. But see *Hatch v. Indianapolis &*

Springfield R. R. Co., 9 Fed. R. 856; *Jennings v. Dolan*, 29 Fed. R. 861.

³ *Hatch v. Indianapolis & Springfield R. R. Co.*, 9 Fed. R. 856; *Fidelity Ins. & Safe Deposit Co. v. Shenandoah Iron Co.*, 42 Fed. R. 372. See *Jennings v. Dolan*, 29 Fed. R. 861.

⁴ *Jennings v. Dolan*, 29 Fed. R. 861.

⁵ *Fischer v. Hayes*, 16 Fed. R. 469.

⁶ *Harding v. Handy*, 11 Wheat. 103; *Foster v. Goddard*, 1 Black, 506; *Greene v. Bishop*, 1 Cliff. 186; *Stanton v. Alabama & C. R. R. Co.*, 2 Woods, 506; *Cutting v. Florida Ry. & Nav. Co.*, 43 Fed. R. 743, 747. In *Duden v. Maloy*, 43 Fed. R. 407, 410, the following exception was held to be insufficient according to the practice in the Second Circuit, and was

cessary is that the exception should distinctly point out the finding and the conclusion of the master which it seeks to reverse." ⁷ Exceptions to the report of a master upon a reference to compute damages for the infringement of a patent, which raised the points that the infringement was not wilful, that the reduction of plaintiff's profits was not solely due to the infringement, and that the master should have reported nominal damages, were held sufficient to bring before the court the whole subject of the computation of damages.⁸ It has been held that the point that a statute is unconstitutional need not be specifically stated in the exception.⁹ Exceptions to the admission or exclusion of evidence, taken upon the hearing before the master, need not be restated in the exceptions filed to this report.¹⁰ If the court is in session when exceptions are filed, they are argued at that session;¹¹ otherwise, at the next session.¹² Every presumption is in favor of the correctness of the decision of a master.¹³ If the testimony is conflicting, the court will rarely interfere with the master's decision on the facts, provided he made no errors in law which affected the result.¹⁴ Where after a master's report had been filed a judgment finding facts opposite to those found by the master had been entered in a State court, in a suit between the same parties, it was held that the judgment of the State court must be followed on the hearing of the exceptions to the report of the master.¹⁵ Trifling errors in a master's statement of an account will be disregarded.¹⁶ Exceptions to a master's report are only proper when he has made an erroneous decision upon the matters referred to him.¹⁷ The remedy for an irregularity in his proceeding, or for his neglect to report upon all of the matters referred to him, is a motion to set aside the report, or to refer the same

consequently disregarded: "For that the master has found contrary to the preliminary requisitions and objections of defendant to his proposed draft report, and which requisitions and objections he here repeats, and contends that fresh evidence should be taken thereon."

⁷ *Foster v. Goddard*, 1 Black, 506, 509, per Mr. Justice Swayne.

⁸ *Boesch v. Graff*, 133 U. S. 697.

⁹ *Fidelity Ins. & S. D. Co. v. Shenandoah Iron Co.*, 42 Fed. R. 372, 374.

¹⁰ *Marks v. Fox*, 18 Fed. R. 713.

¹¹ Rule 83.

¹² Rule 83.

¹³ *Medsker v. Bonebrake*, 108 U. S. 66; *Tilghman v. Proctor*, 125 U. S. 436; *Callaghan v. Myers*, 128 U. S. 611, 666; *Kimberly v. Arms*, 129 U. S. 512, 524.

¹⁴ *Welling v. La Bau*, 34 Fed. R. 40; *Mason v. Crosby*, 3 W. & M. 258; *Gottfried v. Crescent Brewing Co.*, 22 Fed. R. 433; *Jaffrey v. Brown*, 29 Fed. R. 476; *Central Trust Co. v. Texas & St. L. Ry. Co.*, 32 Fed. R. 448.

¹⁵ *Duden v. Maloy*, 43 Fed. R. 408.

¹⁶ *Taylor v. Robertson*, 27 Fed. R. 537.

¹⁷ *Taylor v. Robertson*, 27 Fed. R. 537.

back to the master.¹⁸ A report of a master may be corrected without a re-reference, from facts appearing in the case aside from the evidence taken before him.¹⁹ It has been held in the Second Circuit that if the master errs by an improper rejection of evidence his error should be corrected by an immediate motion to compel him to receive the evidence, and is not the proper subject of an exception to his report.²⁰ The party who files exceptions is obliged to pay costs for each exception overruled, and is entitled to costs for each exception allowed.²¹ The amount of costs is fixed by the court in accordance with a standing rule in each circuit.²² By leave of the court exceptions may be amended.²³ The review of a master's report upon a receiver's account is described in a preceding section.²⁴

§ 316. **Sales by Masters.** — In a proper case, a court of equity, having the possession by a receiver of the property of an insolvent railway company, may make an interlocutory order for the sale of the property before the rights of the parties under the several mortgages have been fully ascertained and determined.¹ In such a case an appeal may be taken at once from the order for the sale, provided the sale is to take place immediately;² but not if any subsequent proceedings and order must precede the sale.³ A court of equity will not make an interlocutory order for an immediate sale of mortgaged property upon terms discharging the lien of a mortgage not yet due, unless it clearly appears that in the end there must be not only a sale of the property, but a sale upon those terms.⁴ When property is ordered to be sold by a master, it must be sold at public auction, unless the court otherwise directs.⁵ Such a sale is conducted under the superintendence of the solicitor for the party at whose prayer the sale is made, and in all questions which subsequently arise between the buyer and the seller it is said that he is considered as

¹⁸ *Tyler v. Simmons*, 6 Paige Ch. (N.Y.) 127.

¹⁹ *Witters v. Soule*, 43 Fed. R. 445; *Kelsey v. Hobby*, 16 Pet. 269; *Parks v. Booth*, 102 U. S. 96.

²⁰ *Celluloid Manuf. Co. v. Cellonite Manuf. Co.*, 40 Fed. R. 476, 478.

²¹ Rule 84.

²² Rule 84.

²³ *Jones v. Lamar*, 39 Fed. R. 585.

²⁴ § 256.

§ 316. ¹ *Pennsylvania R. Co. v. Allegheny Val. R. Co.*, 42 Fed. R. 82, 85, *per* Acheson, J.; *First National Bank v. Schedd*, 121 U. S. 74.

² *First National Bank v. Schedd*, 121 U. S. 74.

³ *Burlington C. R. & N. Ry. Co. v. Simmons*, 123 U. S. 52, 55.

⁴ *Pennsylvania R. Co. v. Allegheny Val. R. Co.*, 42 Fed. R. 82, 86.

⁵ *Daniell's Ch. Pr. ch. xxvi.*

the agent of all the parties to the suit.⁶ The particulars and conditions of the sale are prepared by him. They should be entitled in the cause, and should contain a general description of the nature and situation of the property; and if land, should state in whose possession it is or has lately been.⁷ The conditions of the sale should be in general similar to those annexed to ordinary sales of similar property in the vicinity.⁸ A sale by a receiver is not invalidated by his announcement at the sale that the purchaser will have the option also to buy other property not covered by the order of sale but acquired by him in the due course of his receivership.⁹ The sale should be advertised at least twice, and should give such a description of the property as clearly to indicate and identify it.¹⁰ The master has power to adjourn the sale, even after the auction has begun and bids have been made.¹¹ The sale is conducted in substantially the following manner: The master, his clerk, or a person appointed by him, is present with a paper upon which the biddings for the different lots are to be marked.¹² The lots are successively put up at a price offered by any person present; such person, according to the English practice, signing his name to the sum which he offers on the paper.¹³ If the property to be sold consists of a railroad and its appurtenances, it is usually sold as a single thing.¹⁴ It has been said that railroad property cannot be thus sold piecemeal except by the consent of all the parties expressed in open court or in writing.¹⁵ The court may make a condition of the sale that no bid shall be considered unless each bidder first deposit a specified sum in cash,—in one instance, twenty-five thousand dollars,¹⁶—and that no bid be considered unless it exceed a specified amount.¹⁷ Every

⁶ *Dalby v. Pullen*, 1 R. & M. 296. But see *Blossom v. Railroad Co.*, 3 Wall. 196, 207.

⁷ *Daniell's Ch. Pr.* ch. xxvi.

⁸ *Daniell's Ch. Pr.* ch. xxvi.

⁹ *Lake Superior Iron Co. v. Brown*, *Bonnell & Co.*, 44 Fed. R. 539.

¹⁰ *Kauffman v. Walker*, 9 Md. 229; *Merwin v. Smith*, 1 Green Ch. (N. J) 182; *Daniell's Ch. Pr.* ch. xxvi.

¹¹ *Blossom v. Railroad Co.*, 3 Wall. 196.

¹² *Daniell's Ch. Pr.* ch. xxvi.

¹³ *Daniell's Ch. Pr.* ch. xxvi.

¹⁴ *Bound v. South Carolina Ry. Co.*, 46

Fed. R. 315; *Jones on Railroad Securities*, §§ 625-628.

¹⁵ *Bound v. South Carolina Ry. Co.*, 46 Fed. R. 315, 316, *per* Simonton, J.

¹⁶ *Farmers' L. & Tr. Co. v. Green Bay & Minn. R. R. Co.*, 10 Biss. 203.

¹⁷ *Farmers' Loan & Tr. Co. v. Houston & Texas Central R. R. Co.*, *Pardee & Sabin, JJ.*, May, 1888; *Hervey v. Illinois Midland Ry. Co.*, U. S. C. C., S. D. Illinois, June 10th, 1886; *Roosevelt v. Columbus, C. & I. C. Ry. Co.*, U. S. C. C., N. D. Illinois, *Drummond, J.*, Nov. 15th, 1882; *Jesup v. Wabash, St. L. & P. Ry. Co.*, U. S. C. C., N. D. Ill., *Gresham & Jackson, JJ.*, 1889.

subsequent bidder must do like the first until no person will advance on the last bidder, when the latter is declared the purchaser;¹⁸ unless there has been a reserved bidding fixed, when if the last bidding does not reach the reserved one the person conducting the sale declares that the lot has not been sold, but has been bought in by the persons interested in the estate.¹⁹ It seems that the court may direct that the sale be made for cash, in a suit under a railroad mortgage which provides that the purchase-money may be paid in bonds.²⁰ A bid may be revoked any time before the hammer falls.²¹ A party to the suit has the right to buy at the sale.²² The sale does not take effect until confirmed by the court.²³ Before the confirmation of the sale, a party to the suit, or even a stranger, may intervene and have the sale set aside on paying the purchaser's expenses and offering a sufficient advance in price.²⁴ The confirmation may be upon terms.²⁵ The purchaser may be required to assume responsibility for obligations of the receiver as a condition of the confirmation of the sale.²⁶ Should the purchaser fail to pay the money promised, a resale will be ordered, provided the rights of third persons have not intervened;²⁷ and he may be compelled by attachment issued upon a rule or order to show cause without a new suit, to pay the difference between his bid and the amount realized from the second sale, even though the sale has not been confirmed.²⁸ Such a resale may be ordered by a summary proceeding upon the return of an order to show cause served upon the purchaser,²⁹ and upon the parties at whose suit the sale was made.³⁰

The purchaser at the sale and those who purchase from him take the property subject to the right of the court to modify the decree or the terms of the sale, on appeal, or at the same or the

¹⁸ Daniell's Ch. Pr. ch. xxvi.

¹⁹ Daniell's Ch. Pr. ch. xxvi.

²⁰ *Farmers' L. & Tr. Co. v. G. B. & M. R. R. Co.*, 10 Biss. 203; s. c. 6 Fed. R. 100.

²¹ *Blossom v. Railroad Co.*, 3 Wall. 195. See *Mayhew v. West Virginia Oil & Oil Land Co.*, 24 Fed. R. 205, 215.

²² *Smith v. Black*, 115 U. S. 308.

²³ *Mayhew v. West Virginia Oil & Oil Land Co.*, 24 Fed. R. 205, 215. For a case where the amount of the price was considered and held adequate, see *Lake Superior Iron Co. v. Brown, Bonnell & Co.*, 44 Fed. R. 539.

²⁴ *Blackburn v. Selma R. Co.*, 3 Fed. R. 689.

²⁵ *Farmers' L. & Tr. Co. v. Green Bay & Minn. R. R. Co.*, 10 Biss. 203; s. c. 6 Fed. R. 100; *F. L. & Tr. Co. v. Central R. R. of Iowa*, 17 Fed. R. 758.

²⁶ *F. L. & Tr. Co. v. Central R. R. of Iowa*, 17 Fed. R. 758.

²⁷ *Stuart v. Gay*, 127 U. S. 518.

²⁸ *Stuart v. Gay*, 127 U. S. 518; *Camden v. Mayhew*, 129 U. S. 73.

²⁹ *Stuart v. Gay*, 127 U. S. 518. See *Jaffrey v. Brown*, 29 Fed. R. 476.

³⁰ *Terbell v. Lee*, 40 Fed. R. 40.

succeeding term of the court.³¹ A material change of the terms may be a ground of relieving them from the purchase.³² A party bidding at a foreclosure sale makes himself thereby a party to the suit, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase.³³ He has the right to be heard on all questions thereafter arising affecting his bid,³⁴ which are not foreclosed by the terms of the decree of sale, or expressly reserved to him by such decree.³⁵ Where not concluded by the terms of the decree, any subsequent proceedings to determine in what securities, of diverse value, his bid shall be made good, are matters affecting his interests on which he has the right to be heard:³⁶ and from the rulings thereupon, and on all matters whereby his interests are injuriously affected, he has the right to appeal after the final decree.³⁷

³¹ *Olcott v. Hendrick*, 12 S. C. Rep. 81; 141 U. S. 543, 547; *infra*, § 352.

³² *Olcott v. Hendrick*, 12 S. C. Rep. 81; 141 U. S. 543, 547.

³³ *Kneeland v. American L. & Tr. Co.*, 136 U. S. 89, 95; *Stuart v. Gay*, 127 U. S. 518.

³⁴ *Kneeland v. American L. & Tr. Co.*, 136 U. S. 89, 95; *Williams v. Morgan*, 111 U. S. 684.

³⁵ *Kneeland v. American L. & Tr. Co.*, 136 U. S. 89, 95; *Swann v. Wright's Executors*, 110 U. S. 590.

³⁶ *Kneeland v. American L. & Tr. Co.*, 136 U. S. 89, 95.

³⁷ *Kneeland v. American L. & Tr. Co.*, 136 U. S. 89, 95; *Blossom v. Milwaukee & C. Rd. Co.*, 1 Wall. 655; *Williams v. Morgan*, 111 U. S. 684.

CHAPTER XXIV.

DECREES.

§ 317. **Definition and Classification of Decrees.** — A decree is a sentence or order of a court of equity pronounced after a hearing of the points of issue, and corresponds to a judgment of a court of law. A decree should be distinguished from a decretal order. A decretal order is an order in the nature of a decree, made upon motion or petition, either before or after the hearing, or in an independent proceeding.¹ According to the different standpoints from which they may be regarded, decrees are classified, as final or interlocutory; as *in personam* or *in rem*; as absolute, conditional, decrees *nisi*, or decrees in the nature of decrees *nisi*.

§ 318. **Final and Interlocutory Decrees.** — Decrees are either final or interlocutory. These terms are used with different meanings in the English practice and in that in the courts of the United States. A final decree in the English Chancery was a complete determination of every question arising in a cause.¹ An interlocutory decree was one which reserved the further consideration of any question arising in a cause till a future hearing.² In strictness, moreover, every decree was said to be interlocutory until it was signed and enrolled.³ In England, an appeal lay from an interlocutory as well as from a final decree;⁴ but, under the Judiciary Acts, before that of March 3, 1891, only final decrees of a Federal court could be brought to a court of appeal for revision.⁵ On account of the inconvenience which would have followed, had the old definition been applied to the term used in this statute, the Federal courts have refused to follow the English Chancery in this respect. As far as appeals are concerned, a decree is considered final which decides the right to property, and orders that it be sold or delivered to a party; or creates a lien upon property

§ 317. ¹ Barbour's Chancery Practice, 337.

§ 318. ¹ Seton's Decrees (4th ed.), 2.

² Seton's Decrees (4th ed.), 2.

³ Forum Romanum, 183; Seton's Decrees (4th ed.), 2.

⁴ Forgay v. Conrad, 6 How. 201, 205.

⁵ U. S. R. S. §§ 631, 692.

by the issue of receiver's certificates or otherwise; or directs a specific sum of money to be paid to a party either by another person or out of a fund in court, provided that the successful party is entitled to compel its immediate execution,⁶ even though the consideration of other matters arising upon the pleadings is reserved "for further consideration" in it.⁷ A decree is final which settles all the rights of the parties involved in the pleadings, though it gives leave to either one of them to apply at the foot of the decree "in relation to any matter not finally determined by it."⁸ A decree dismissing a bill with costs to be subsequently taxed was held to be a final decree, although a judgment for the costs was subsequently entered after their taxation.⁹ A decree dismissing a bill as to all matters except one severable from the rest was held to be a final decree as regards the matters which it then determined.¹⁰ All other decrees which reserve any question for the court's further decision, even though they direct money to be paid into court,¹¹ or property to be delivered to a receiver,¹² or to a new trustee appointed by the court,¹³ or dissolve an injunction,¹⁴ or punish a party for contempt,¹⁵ or direct a sale, but do not sufficiently specifically determine the property to be sold to warrant an immediate sale,¹⁶ or direct a sale, but do not appoint the time of sale,¹⁷ are, it seems, interlocutory decrees from which no appeal can under the Judiciary Acts be taken;

⁶ Chief Justice Taney in *Forgay v. Conrad*, 6 How. 201, 204; *Michoud v. Girod*, 4 How. 503; *Ray v. Law*, 3 Cranch, 179; *Whiting v. Bank of the United States*, 13 Pet. 6; *Wabash & E. Canal Co. v. Beers*, 1 Black, 54; *Bronson v. Railroad Co.*, 2 Black, 524; *Milwaukie & M. R. R. Co. v. Soutter*, 2 Wall. 440; *Thomson v. Dean*, 7 Wall. 342; *Railroad Co. v. Bradleys*, 7 Wall. 575; *Stovall v. Banks*, 10 Wall. 583; *French v. Shoemaker*, 12 Wall. 86; *Marin v. Lalley*, 17 Wall. 14; *Trustees v. Greenough*, 105 U. S. 527; *Farmers' L. & Tr. Co., Petitioner*, 129 U. S. 206; *Lewisburg Bank v. Sheffey*, 140 U. S. 445.

⁷ *St. Louis, I. M. & S. R. R. Co. v. Southern Express Co.*, 108 U. S. 24; *Mo. K. & T. R. R. Co. v. Dinsmore*, 108 U. S. 30; *Lewisburg Bank v. Sheffey*, 140 U. S. 445.

⁸ *French v. Shoemaker*, 12 Wall. 86.

⁹ *Fowler v. Hamill*, 139 U. S. 549.

¹⁰ *Hill v. Chicago & E. R. R. Co.* 140 U. S. 52. But see *Keystone Iron Co. v. Martin*, 132 U. S. 91.

¹¹ *Forgay v. Conrad*, 6 How. 201; *Beebe v. Russell*, 19 How. 283; *Louisiana Bank v. Whitney*, 121 U. S. 284. But see *Wabash & Erie Canal v. Beers*, 1 Black, 54.

¹² *Forgay v. Conrad*, 6 How. 201; *Beebe v. Russell*, 19 How. 283; *Hentig v. Page*, 102 U. S. 219. But see *Wabash & Erie Canal v. Beers*, 1 Black, 54.

¹³ *Pulliam v. Christian*, 6 How. 209.

¹⁴ *Young v. Grundy*, 6 Cranch, 51; *Moses v. Mayor*, 15 Wall. 387; *Verden v. Coleman*, 18 How. 86; *Knox County v. Harshman*, 132 U. S. 14.

¹⁵ *Hayes v. Fischer*, 102 U. S. 121.

¹⁶ *Railroad Co. v. Swasey*, 23 Wall. 405.

¹⁷ *Parsons v. Robinson*, 122 U. S. 112; *Burlington, C. R. & N. Ry. Co. v. Simmons*, 123 U. S. 52.

although, if the decision of the court in making them was erroneous, the final decree may be reversed on that account upon an appeal by a party who was thereby injured.¹⁸

§ 319. *Decrees in personam.* — Decrees are either *in personam* or *in rem*. Decrees *in personam* are those which contain a command to one of the parties to a suit in equity. Decrees *in rem* are such as without containing command to either of the parties transfer the title to property. Decrees *in personam* may direct the performance of, or the abstention from an act or acts. The ordinary decree of a court of equity is a decree *in personam*. Such a decree may be made even though it directs the performance of or abstention from an act, or directs a transfer, or otherwise affects the title to property beyond the jurisdiction of the court.¹ By statute when a Federal court of equity awards an injunction against the infringement of a patent, it may assess the damages the complainant has sustained by the injunction, as well as compel an account of the profits;² and has the power to award treble damages³ but not to award treble profits.⁴ A statute provides that "the original jurisdiction of the circuit court for the Southern District of New York shall not be construed to extend to causes of action arising within the Northern District of said State."⁵ Where in order to obtain the relief sought it would be necessary for the court to take possession by its officers of land beyond its territorial jurisdiction, it has been said that such a decree should not be granted.⁶ Thus, it seems that the court will not decree a partition of land beyond the jurisdiction, since

¹⁸ *Buckingham v. McLean*, 13 How. 150.

§ 319. ¹ *Arglasse v. Muschamp*, 1 Vern. 75; *Carron Iron Co. v. Maclaren*, 5 H. L. C. 416; *Muller v. Dows*, 94 U. S. 444; *Wheeler v. McCormack*, 4 Fisher's Pat. Cas. 433; s. c. 8 Blatchf. 267. For an excellent review of the authorities, see the learned opinion of Judge, subsequently Chief Judge Davies, in *Gardner v. Ogden*, 22 N. Y. 327. See also *Carpenter v. Strange*, 141 U. S. 87.

² U. S. R. S. § 4921.

³ U. S. R. S. §§ 4921, 4917; *Livingston v. Woodworth*, 15 How. 546; *Zine v. Peck*, 13 Fed. R. 475; *Lyon v. Donaldson*, 34 Fed. R. 789; *Welling v. La Bau*, 35 Fed. R. 302; *Guyon v. Serrell*, 1 Blatchf.

244; *Peck v. Frame*, 9 Blatchf. 194; *Saunders v. Logan*, 2 Fisher, 167; *Schwanzel v. Holensshade*, 3 Fisher, 196; *Brodie v. Orphir Silver Mining Co.*, 4 Fisher, 37.

⁴ *Covert v. Sargent*, 42 Fed. R. 298; *Campbell v. James*, 5 Fed. R. 807.

⁵ U. S. R. S. § 657; *Hodge v. Hudson River Railroad Co.*, 3 Fisher's Pat. Cas. 410; s. c. 6 Blatchf. 85; *Locomotive E. S. T. Co. v. Erie Railway Co.*, 10 Blatchf. 292; *Black v. Thorne*, 10 Blatchf. 66. See § 23.

⁶ *Muller v. Dows*, 94 U. S. 444, 449; *Macgregor v. Macgregor*, 9 Iowa, 65; *Glen v. Gibson*, 9 Barb. (N. Y.) 634; *Story's Eq. Jur.* § 1292; 2 *Spence*, 8, n (d); *Smith's Eq.* 30; *Bispham's Eq.* § 47.

no commission appointed by it could have authority to act there;⁷ but it will decree specific performance of a contract, or the foreclosure of a mortgage affecting land no matter where it may be situated.⁸ It has been held in England that the court will make no decree in a suit between two foreigners not residents of the country concerning a contract made or land situated elsewhere.⁹ And a Georgian case holds that a court of equity will not compel a corporation to perform a contract to open ditches and keep fences in repair in a State where it has no corporate existence.¹⁰ It often happens, however, that the court can do a thing itself more easily and effectively than it can compel it to be done by the party concerned, as, for example, when it wishes to sell property or to cancel an instrument in writing, and it then will perform that duty by means of a master or receiver.¹¹ When all the defendants are within the jurisdiction, such a decree is usually accompanied by a command to them to confirm the sale or other action of the court, or to assist in the transaction directed by the decree. When a defendant is beyond the jurisdiction, the court sometimes acts by a decree *in rem*.

§ 320. *Decrees in rem.* — A decree *in rem* is one that determines the title to or an interest in real or personal property within the territorial jurisdiction of the court, without having any other effect upon a defendant who dwells beyond that jurisdiction and has not been served with process within it. Such an equitable decree must be distinguished from the decrees *in rem* of a court of admiralty, which establish a title conclusively against all the world: whereas it is only binding upon the parties to the action in which it is rendered. Such decrees were formerly very rare,¹ and are in the Federal courts of equity purely statutory, and the power of these courts to make them depends entirely upon a strict compliance with the provisions of the statute allowing them.² Whether or not, under this statute or otherwise, a decree

⁷ 2 Spence, 8, n (d); Story's Eq. Jur. § 1292; Smith's Eq. 30; Bispham's Eq. § 47.

⁸ Penn v. Lord Baltimore, 1 Ves. Sen. 441; Massie v. Watts, 6 Cranch, 148; Muller v. Dows, 94 U. S. 444; McElrath v. The Pittsburg & Steubenville R. R. Co., 5 Pa. St. 189.

⁹ Matthaei v. Galitzin, L. R. 18 Eq. 340; Blake v. Blake, 18 W. R. 944.

¹⁰ Port Royal R. R. Co. v. Hammond, 58 Ga. 523.

¹¹ Langdell's Eq. Pl. § 44. See *infra*, § 349.

§ 320. ¹ But see Anon., 1 Atk. 18.

² U. S. R. S. § 738; Act of March 3, 1875, ch. 137, § 8 (18 St. at L. 472). See *supra*, § 97.

can be made and enforced which requires the specific performance of a contract for the conveyance of property within the court's jurisdiction against a person not served there with process, has never been decided.³

§ 321. **Absolute and Conditional Decrees.**—Decrees are either absolute, conditional, *nisi*, or in the nature of decrees *nisi*. An absolute decree is one that takes effect immediately upon its entry and is dependent for its enforcement upon no condition, and is not subject to be defeated by the occurrence of any subsequent event. A conditional decree is one that by its terms is not to take effect unless something shall be done by the party to whom relief is given by it. Under the present state of the authorities, it would be rash to attempt to lay down a rule as to when a conditional decree will be granted, and when the plaintiff will be denied relief unless he has made a specific offer or waiver in his bill.¹ The following are a few of the cases when a conditional decree alone has been granted. An express company has been granted a decree compelling a railroad company to carry freight for it, upon condition that it should give the latter a bond to pay such charges as the court should subsequently consider reasonable.² A decree for the redemption of a mortgage is upon condition that the plaintiff pay the balance reported due from him within six months, which it seems must be lunar not calendar months, after the report, in default whereof the plaintiff's bill against the defendant is from thenceforth to stand dismissed out of court with costs.³ Upon default, a final order, which will be granted as of course, is necessary to dismiss the bill.⁴ A decree allowing a junior incumbrancer to redeem may be upon condition that he pay off a prior incumbrance, and repay to its holder money paid by him in discharging still prior incumbrances, and for taxes, repairs, and insurance upon the mortgaged premises.⁵ Similarly, a decree upon a bill by a purchaser for the specific performance of an agreement for the sale of an estate may appoint a time and place for the pay-

³ See *Ward v. Arredondo*, Hopkins Ch. (N. Y.) R. 243; *Anon.* 1 Atk. 18; *Rourke v. McLaughlin*, 38 Cal. 196; *Matteson v. Seofield*, 27 Wis. 671; Story's Eq. Jur. § 744 n. 3.

§ 321. ¹ See *Moore v. Crawford*, 130 U. S. 122, 140.

² *Southern Express Co. v. St. Louis, I. M. & S. R. R. Co.*, 10 Fed. R. 210, reversed Express Cases, 117 U. S. 1.

³ Seton on Decrees, 140; *Waller v. Harris*, 7 Paige (N. Y.), 167.

⁴ Seton on Decrees, 178.

⁵ *McCormick v. Knox*, 105 U. S. 122.

ment of the purchase-money, with interest if any be due, and direct that in default of payment the bill be dismissed with costs.⁶ A decree for an accounting should always contain a submission by the plaintiff to account.⁷ It has been made a condition precedent to the entry of a decree to enjoin the infringement of a patent, that the complainant first file in the Patent Office a disclaimer of those of the claims in the patent to which he is not entitled.⁸ For conditions of sale in suits to foreclose railway mortgages see the preceding section upon sales by masters.⁹

§ 322. *Decrees nisi* — A decree *nisi* is one giving a defendant a certain specified time within which to show cause against a decree or to perform some other act in relation thereto, in default whereof it shall be absolute against him. Such a decree is made against an infant or a mortgagor, or the latter's assigns. According to the English rule, all decrees against an infant defendant which require some act to be performed by him,¹ or direct a conveyance or a foreclosure of his interest in any real estate, must contain a clause giving him an opportunity to show cause against it after he has come of age.² When a sale of land is directed by such a decree, it usually contains a direction that, in the mean time, a purchaser under the sale shall hold and enjoy the estate against the infant until he attains full age;³ and the court so far protects a purchaser that it will not permit his title to be affected by a mere irregularity in the decree.⁴ When a decree directs a conveyance by both adult and infant parties, as in a partition suit, it seems that it should not direct a conveyance by any till the infant is of age and has had an opportunity to show cause against the decree, and in the mean time should only extend so far as to give possession in accordance with the court's decision, and order enjoyment accordingly till effectual conveyances can be made.⁵ It seems that in no other

⁶ *Lowther v. Andover*, 1 Bro. C. C. 396.

⁷ *Fowler v. Wyatt*, 21 Beav. 232; Seton on Decrees (4th ed.), 775.

⁸ *Sessions v. Romadka*, 21 Fed. R. 124, 133; *Hake v. Brown*, 37 Fed. R. 783; *Electrical Accumulator Co. v. Julien Electric Co.*, 38 Fed. R. 117.

⁹ § 316.

§ 322. ¹ *Walsh v. Trevannion*, 16 Simons, 178; *Eyre v. The Countess of Shaftsbury*, 2 P. Wms. 102; *Sheffield v. The*

Duchess of Buckingham, 1 West, 682; *Thoroton v. Blackborne*, 2 W. Kelynge, 7; Seton on Decrees (4th ed.) 712, 713.

² *Williamson v. Gordon*, 19 Ves. 114; *Mallack v. Galton*, 3 P. Wms. 352; *Newbury v. Marten*, 15 Jur. 166; *Mills v. Dennis*, 3 J. Ch. (N. Y.) 367; Seton on Decrees (4th ed.) 714. But see *Croxon v. Lever*, 12 W. R. 237.

³ *Powell v. Powell*, Mad. & Geld. 53.

⁴ *Bennet v. Hamill*, 2 Sch. & Lef. 566.

⁵ *Agar v. Fairfax*, 17 Ves. 533, 554;

instances will a decree *nisi* be entered against an infant defendant, although there is some doubt upon this point.⁶ In a few exceptional cases, when an infant plaintiff in his bill exercised an election between two conflicting claims, the court has allowed him a day after he became of age in which to show cause against it.⁷ The usual form of the *nisi* clause in such a decree is as follows: "And this decree is to be binding on the defendant, the infant, unless on being served, after he shall have attained the age of twenty-one years, with subpœna to show cause against this decree, he shall within six months from the service of such subpœna show unto this court good cause to the contrary."⁸ Such a clause should be inserted in the order for making a decree of foreclosure absolute, as well as in the decree.⁹ The omission of a similar clause in such a decree is error.¹⁰ The six months after the service of process within which cause must be shown must be, it seems, lunar not calendar months.¹¹ At the expiration of them and upon proof of the requisite facts, an order making the original decree absolute should be entered.¹² A decree for a foreclosure should also be *nisi*, providing for either a strict foreclosure or a foreclosure sale, unless the whole amount due shall be paid within a reasonable time, usually six lunar months, from the time of the conclusion of the accounting and the certificate of what is due under the mortgage.¹³ An omission of such a clause is error.¹⁴ At the expiration of the allotted time, if the debt be still unpaid, the plaintiff should obtain an order confirming the foreclosure or directing the sale.¹⁵ The time for payment may always be enlarged, even after a peremptory order for a sale,¹⁶ upon terms, which usually are that the defendant give

Attorney-General *v.* Hamilton, 1 Madd. 214.

⁶ Seton on Decrees (4th ed.), 714; Eyre *v.* The Countess of Shaftsbury, 2 P. Wms. 102; Sheffield *v.* The Duchess of Buckingham, 1 West. 682. See Kingsbury *v.* Buckner, 134 U. S. 650.

⁷ Gregory *v.* Molesworth, 3 Atk. 626; Sir John Napier *v.* Lady Effingham, 2 P. Wms. 401; Lord Brook *v.* Lord Hertford, 2 P. Wms. 518; Taylor *v.* Philips, 2 Ves. Sen. 23.

⁸ Seton on Decrees (4th ed.), 711.

⁹ Williamson *v.* Gordon, 19 Ves. 114.

¹⁰ Coffin *v.* Heath, 6 Met. (Mass.) 76.

¹¹ Seton on Decrees (4th ed.), 711.

¹² Seton on Decrees (4th ed.), 711.

¹³ Clark *v.* Reyburn, 8 Wall. 318; Howell *v.* Western R. R. Co., 94 U. S. 463; Chicago & V. R. R. Co. *v.* Fosdick, 106 U. S. 47; Perine *v.* Dunn, 4 J. Ch. (N. Y.) 140.

¹⁴ Clark *v.* Reyburn, 8 Wall. 318.

¹⁵ Seton on Decrees (4th ed.), 1091; Chicago & V. R. R. Co. *v.* Fosdick, 106 U. S. 47, 71; Sheriff *v.* Sparks, West, 130; Senhouse *v.* Earl, 2 Ves. Sen. 450; Whiting *v.* Bank of United States, 13 Pet. 6.

¹⁶ Edwards *v.* Cunliffe, 1 Madd. 287; Seton on Decrees (4th ed.), 1088.

good security to pay the amount due, with interest and costs in full.¹⁷ It has also been held that a decree of foreclosure absolute may also be reopened;¹⁸ but it has been said that this can only be done when it has been obtained by fraud or under circumstances of oppression.¹⁹ The Supreme Court has held that "what is indispensable to such a decree is, that there should be declared the fact, nature, and extent of the default which constituted the breach of the condition of the mortgage, and which justified the complainant in filing his bill to foreclose it, and the amount due on account thereof, which, with any further sums subsequently accruing, and having become due, according to the terms of the security, the mortgagor is required to pay within a reasonable time, to be fixed by the court, and which if not paid, a sale of the mortgaged premises is directed."²⁰ By rule, "in suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of the Supreme Court regulating the equity practice, when the decree is solely for the payment of money."²¹ This rule does not authorize, on the foreclosure of a mortgage for the failure to pay interest, the entry of a decree for the balance of principal not due.²² A State statute giving mortgagors a right of redemption within a certain time after a mortgage sale, will in all cases be followed by the Federal courts, since it establishes a rule of property.²³ In the absence of such a statute there is no right of redemption after the sale under a decree of foreclosure has been confirmed.²⁴

§ 323. *Decrees in the nature of Decrees nisi.* — Decrees in the nature of decrees *nisi* are decrees taking a bill against a defend-

¹⁷ *Monkhouse v. Corporation of Bedford*, 17 Ves. 380; *Geldard v. Hornby*, 1 Hare, 251; *Holford v. Yate*, 1 K. & J. 677; *Coombe v. Stewart*, 13 Beav. 11.

¹⁸ *Campbell v. Holyland*, L. R. 7 Ch. D. 166; *Seton on Decrees* (4th ed.), 1088.

¹⁹ *Patch v. Ward*, L. R. 3 Ch. 203, 212; *Seton on Decrees* (4th ed.), 1098.

²⁰ *Chicago & Vincennes Railroad Company v. Fosdick*, 106 U. S. 47, 70, *per Matthews, J.*

²¹ Rule 92.

²² *Ohio Central R. R. Co. v. Central Trust Co.*, 133 U. S. 83.

²³ *Brine v. Insurance Co.*, 96 U. S. 627; *Orvis v. Powell*, 98 U. S. 176; *Hammock v. Loan & Trust Co.*, 105 U. S. 77; *Mason v. Northwestern Ins. Co.*, 106 U. S. 163; *Conn. Mutual Life Ins. Co. v. Cushman*, 108 U. S. 51.

²⁴ *Parker v. Daeres*, 130 U. S. 43.

ant as confessed, and decrees under the statute affecting property within, and against a defendant without the jurisdiction of the court. Decrees taking bills as confessed are described in Chapter VII. The cases when a decree against a defendant not served with process can be entered under the Act of March 3d, 1875, have been already described.¹ Any defendant or defendants to such a statutory decree "not actually personally notified" of the suit, in accordance with the provisions of the statute, may, at any time within one year after final decree, enter his appearance in said suit, and thereupon the court must make an order setting aside the decree therein, and permitting such defendant to plead on payment of such costs as the court shall deem just; and thereupon the suit is proceeded with to final judgment according to law.²

§ 324. **Time of Entry of Decree.**—A decree can regularly be entered only during a term of the court.¹ The court has power to allow a decree to be entered even in vacation as of a previous term, *nunc pro tunc*.² Such leave will always be granted when the delay was caused by the action of the court.³

§ 325. **Frame of Decree.**—Decrees originally always consisted of three, and sometimes of four, parts. These were: the date and title; the recitals; the declaratory part, if that were required; and the ordering part.¹ A decree usually begins with a recital of the day of the month and year when it was pronounced,² and of the title of the cause, in which the parties should have the same designations that were given them in the bill.³ Next always followed, formerly, a recital of the pleadings, evidence, and former proceedings in the cause.⁴ The equity rules, however, provide that "In drawing up decrees and orders, neither the bill nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: 'This cause came on to be heard (or to be further heard, as

§ 323. ¹ See § 97.

² U. S. R. S. § 738; Act of March 3, 1875, ch. 137, § 3 (18 St. at L. 472), 1st Supp. U. S. R. S. 176.

§ 324. ¹ *Griswold v. Hill*, 1 Paine, 483.

² *Gray v. Brignardello*, 1 Wall 627; *Griswold v. Hill*, 1 Paine, 483.

³ *Gray v. Brignardello*, 1 Wall. 627.

§ 325. ¹ *Daniell's Ch. Pr.* ch. xxv.

² *Whitney v. Belden*, 4 Paige (N. Y.), 140; *Barclay v. Brown*, 7 Paige (N. Y.), 245.

³ *Daniell's Ch. Pr.* ch. xxv.

⁴ *Seton on Decrees* (4th ed.), 9-19.

the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.'"⁵ When a decree is entered by consent, the fact that consent was given should be stated. The proper place for such a statement is ordinarily in the recitals, unless consent be only given to certain directions, when the statement of the consent should immediately precede such directions.⁶ It has been said also that it should appear affirmatively upon the face of the decree, that the defendant was properly served with process.⁷ The declaratory part of a decree, which if desired at all should be next inserted, contains a declaration of matters of fact, or of the rights of one or more of the parties to the cause, or a statement of the reason for the decree or any part thereof. This statement of reasons is not usual,⁸ although its utility has been noticed,⁹ and it is sometimes adopted.¹⁰ Instances of declarations of matters of fact are, the existence and validity of a will or other instrument,¹¹ and the validity of a patent.¹² So, whenever there are interfering patents, and a suit is brought by any person interested in any one of them, or in the working of any one of them, to obtain relief against the interfering patentee, the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication can affect the right of any person, except the parties to the suit and those deriving title under them subsequent to the rendition of such decree.¹³ And where a party establishes his right to property, the direction to transfer it to him is often preceded by a declaration of his title.¹⁴ The court will not thus decide rights as between co-

⁵ Rule 86.⁶ Seton on Decrees (4th ed.) 1535; *Bartlett v. Wood*, 9 W. R. 817.⁷ *Allen v. Blunt*, 1 Blatchf. C. C. 480.⁸ *Ex parte Earl of Hechester*, 7 Ves. 348, 373; Seton on Decrees (4th ed.), 19.⁹ *Bax v. Whitbread*, 16 Ves. 15, 24; *Gordon v. Gordon*, 3 Swanst. 400, 478.¹⁰ *Gordon v. Gordon*, 3 Swanst. 400, 478; *Jenour v. Jenour*, 10 Ves. 573; *Attorney-General v. Clapham*, 4 De G. M. &G. 591, 607; *Austin v. Austin*, 11 Jur. n. s. 536.¹¹ Seton on Decrees (4th ed.) 19, 20.¹² *Union Sugar Refinery v. Mathiesson*, 3 Cliff. 146.¹³ U. S. R. S. § 4918. See *Foster v. Lindsay*, 3 Dill. 126; *Pentlarge v. Pentlarge*, 19 Fed. R. 817; s. c. 22 Fed. R. 412.¹⁴ *Jenour v. Jenour*, 10 Ves. 562; Seton on Decrees (4th ed.), 20.

defendants unless a cross-bill have been filed for that purpose,¹⁵ or it be necessary in order to determine the rights of the plaintiff, or possibly when the evidence is clear and the case between them ripe for decision ;¹⁶ and language in a decree broad enough to determine such rights will usually be construed as merely determining rights as between the plaintiff and the defendants, if no controversy between the defendants appear upon the pleadings.¹⁷ The court will not make a declaration of mere future rights,¹⁸ nor as to the rights of parties upon a contingency that has not happened,¹⁹ nor, it was formerly held, as to mere legal rights ;²⁰ unless such a determination is indispensable to the declaration of the present equities of the parties. A declaration that a deed to property beyond the jurisdiction of the court is fraudulent and void is of no effect unless accompanied by a direction that a party to the suit execute a reconveyance or deliver up the deed for cancellation, and compliance is made with such direction.²¹ It seems that the court will not make a declaration of the rights of the parties in a decree taken *pro confesso* or upon a defendant's default at the hearing.²² The conclusion of a decree is its ordering or mandatory part, which contains the specific directions of the court upon the matter before it.²³ As these directions vary according to the nature of the case before the court, it would be impossible to lay down any definite rule concerning them. Nothing is more elastic and less arbitrary than this part of a decree in equity. The directions to the different parties may be separate, reciprocal, direct, or inverted, as long as they are not inconsistent.²⁴ If there be several plaintiffs suing jointly, the decree may be joint or several, in conformity with their respective rights, as finally determined ; and if a num-

¹⁵ *Thomas v. Lloyd*, 25 Beav. 620 ; *Graham v. Railroad Co.*, 3 Wall. 704, Seton on Decrees (4th edition), 20. See §§ 170, 171.

¹⁶ *Jolly v. Arbutnot*, 4 De G. & J. 224, 245 ; *Gresley v. Mousley*, 4 De G. & J. 78, 99 ; *Cottingham v. Earl of Shrewsbury*, 3 Hare, 627 ; Seton on Decrees (4th ed.), 20.

¹⁷ *Graham v. Railroad Co.*, 3 Wall. 704.

¹⁸ *Cross v. De Valle*, 1 Wall. 5, *Lady Langdale v. Briggs*, 4 W. R. 703 ; *Fletcher v. Bealey*, 33 W. R. 745 ; Seton on Decrees (4th ed.), 20.

¹⁹ *Dowling v. Dowling*, L. R. 1 Ch. 612 ; Seton on Decrees (4th ed.), 20.

²⁰ *Birkenhead Docks v. Laird*, 4 De G. M. & G. 732, *Webb v. Byng*, 8 De G. M. & G. 633 ; Seton on Decrees (4th ed.), 20.

²¹ *Carpenter v. Strange*, 141 U. S. 87, 106.

²² *Jennings v. Simpson*, 1 Keen, 404.

²³ *Daniel's Chancery Practice*, chap. xxv.

²⁴ *Lingan v. Henderson*, 1 Bland (Md.), 236, 275 ; *Hodges v. Mullikin*, 1 Bland (Md.), 503, 507 ; *Owings' Case*, 1 Bland (Md.), 370, 404.

ber of defendants, a single direction may be given to all, or a separate direction, or even a separate decree against each.²⁵ Certain general rules governing particular kinds of decrees may, however, be stated. If the decree be for the performance of any specific act except the payment of money, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree must prescribe the time within which the act must be done.²⁶ Decrees for an account should always specify the time from which the account is to be taken.²⁷ "Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same, to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct."²⁸ The old form of a decree to set aside a forged instrument was that the document "be cut, damned, and cancelled."²⁹ In suits in equity for the foreclosure of mortgages, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same as is provided in the eighth equity rule.³⁰ Where Bradley was trustee under two deeds of trust, a decree appointing Johnson a trustee in his place "in the deed of trust," without specifying which deed of trust, was held void for uncertainty.³¹

²⁵ *Lingan v. Henderson*, 1 Bland (Md.), 236, 256; *Hodges v. Mullikin*, 1 Bland (Md.), 503, 507; *Quarles v. Quarles*, 2 Munford (Va.), 321; *Elliott v. Pell*, 1 Paige (N. Y.), 263.

²⁶ Rule 8.

²⁷ *Cummins v. Adams*, 2 Irish Eq. 393.

²⁸ Rule 73.

²⁹ *Bishop of Winchester v. Fournier*, 2 Ves. Sen. 445; *Finton v. Earl of Macclesfield*, 1 Vern. 287, 292; *Seton on Decrees* (4th ed.), 1346.

³⁰ Rule 92.

³¹ *Shepherd v. Peffer*, 133 U. S. 626.

CHAPTER XXV.

COSTS AT LAW AND IN EQUITY.

§ 326. **Definition of Costs and Distinction between Costs at Law and in Equity.**—Costs is the term given to the sum of money which is paid to the successful party to a litigation, to reimburse him for his expense and trouble in the same. The costs of an action at law are governed by fixed and arbitrary rules.¹ In equity, the award or denial of costs is always in the discretion of the court;² and so very frequently is their amount when awarded.³ When, however, it is said, as it often is, that the award of costs in equity is purely discretionary, it should not be supposed that courts of equity are governed by no fixed principles in their decisions relative to the costs of proceedings before them. All that is meant by the expression is that, in awarding costs, they will take into consideration the circumstances of the cases before them and the situation or conduct of the parties, and exercise with reference to these points a discretion governed by certain reasonably definite rules, the enforcement of which is not dependent upon the caprice of the judge by whom each cause happens to be heard, but is often a ground of review by an appellate tribunal.⁴

§ 327. **Who are given Costs.**—Courts of common law invariably award costs to the successful party, except in the cases hereafter stated.¹ Courts of chancery in general follow the rule of the civil law, *victus victori in expensis condemnatus est*, and decree the payment of costs by the unsuccessful to the successful parties to a suit before it.² It often happens, however, that they depart so

§ 326. ¹ *Hathaway v. Roach*, 2 W. & M. 63.

² *Riddle v. Mandeville*, 6 Cranch, 86.

³ *Trustees v. Greenough*, 105 U. S. 527; *Central Railroad v. Pettus*, 113 U. S. 116.

⁴ *Brooks v. Byam*, 2 Story, 553; *Trustees v. Greenough*, 105 U. S. 527; *Central R. R. v. Pettus*, 113 U. S. 116.

§ 327. ¹ *Hathaway v. Roach*, 2 W. & M. 63.

² *Wooster v. Handy*, 23 Fed. R. 49; *Am. Diamond Rock Co. v. Sheldon*, 25 Fed. R. 217; *Vancouver v. Bliss*, 11 Ves. 458; *Staines v. Morris*, 1 V. & B. 8; *Milington v. Fox*, 3 M. & C. 338, 258; *Hunter v. Town of Marlboro'*, 2 W. & M. 168; *Hovey v. Stevens*, 3 W. & M. 17.

far from this rule as to deny costs to the successful party, and, in certain classes of cases, they will even compel him to pay costs to those against whom he obtains a decree.³ In some cases the costs may be apportioned.⁴ Under no circumstances, however, will a court dismiss the plaintiff's bill and award him costs against a defendant,⁵ although under special circumstances it might then allow him costs out of a fund in court.⁶ If a plaintiff begins or continues a suit after he has received formal notice of a full and unconditional offer of all that he is entitled to, he may be denied costs, not only of all the proceedings taken by him after such an offer,⁷ but also of the whole suit.⁸ This principle applies to bills for an accounting: when, although on account of the uncertain state of the account the defendant may not be able to, and so does not, make a tender of the balance due from him, yet if he has shown a willingness to account, the court may relieve him from paying costs.⁹ If a plaintiff charge fraud which, though he establishes his case on other grounds, he fails to prove;¹⁰ or, in some cases, if he claims relief more extensive than that to which he is entitled;¹¹ or if, on account of public policy or otherwise, he is allowed to obtain relief in a matter wherein he himself acted unlawfully or dishonorably;¹² or if he have been guilty of laches,¹³ which do not bar his claim entirely, — he will be denied costs. A defendant will also be denied costs when successful under similar circumstances;¹⁴ for instance, when the plaintiff's bill is clearly bad and he answers instead of demurring.¹⁵ The English rule seems to be that it is beneath the dig-

³ *Grattan v. Appleton*, 3 Story, 755; *Brooks v. Byam*, 2 Story, 553.

⁴ *Farwell v. Kerr*, 28 Fed. R. 345; *Lippincott v. Shaw Carriage Co.*, 34 Fed. R. 570.

⁵ *Barns v. Omalley*, 4 McLean, 576; *Hobbs v. McLean*, 117 U. S. 567. But see *Fechheimer v. Baum*, 43 Fed. R. 719, 730, and *infra*, § 335.

⁶ *Fechheimer v. Baum*, 43 Fed. R. 719, 734, *infra*, § 335. But see *Hobbs v. McLean*, 117 U. S. 567.

⁷ *Millington v. Fox*, 3 M. & C. 338, 352; *Loveridge v. Larned*, 7 Fed. R. 294; *Calkins v. Bertrand*, 8 Fed. R. 755. But see *Inhabitants of New Providence Township v. Halsey*, 117 U. S. 336.

⁸ *Millington v. Fox*, 3 M. & C. 338, 352.

⁹ *Parrot v. Treby*, Prec. in Ch. 254; *Bennett v. Atkins*, 1 Y. & C. 247; *Ashburnham v. Thompson*, 13 Ves. 402. But see *Daniell's Ch. Pr.* (5th Am. ed.) 1396, 1397.

¹⁰ *Wright v. Howard*, 1 Sim. & S. 190; *Scott v. Dunbar*, 1 Molloy, 442. See *Fisher v. Boody*, 1 Curtis, 206, 223.

¹¹ *Baldwin v. Ely*, 9 How. 580.

¹² *Debenham v. Ox*, 1 Ves. Sen. 276; *Davis v. Symonds*, 1 Cox Eq. 402.

¹³ *Anon.*, 2 Atk. 14; *Lee v. Brown*, 4 Ves. 362.

¹⁴ *Attorney-General v. Brewers' Co.*, 1 P. Wms. 376; *Bunker v. Stevens*, 26 Fed. R. 245.

¹⁵ *Brooks v. Byam*, 2 Story, 553; *Harland v. Bankers' & M. Tel. Co.*, 32 Fed. R. 305.

nity of a sovereign to demand costs, and that, therefore, when he is successful in a suit, his counsel will waive all claim for any.¹⁶ Instances when costs have not been given to a successful party, because the situation of his adversary appealed to the sympathy of the court, were when the decision of the case involved the decision of a difficult and doubtful question of law,¹⁷ especially in suits brought for the specific performance of a contract affecting the sale of land;¹⁸ when the court enforced a contract made upon a very inadequate consideration;¹⁹ and in other cases of peculiar hardship.²⁰ A change of the law by a ruling of the Supreme Court subsequent to the filing of the bill has been held no ground for refusing the defendant costs.²¹ Costs are usually included in a decree for a perpetual injunction against the infringement of a trademark, although no demand that he cease using the trademark was made on the defendant before the suit was brought.²²

The Revised Statutes provide that when in a Circuit Court a plaintiff in an action at law originally brought there, or a petitioner in equity other than the United States, recovers less than the sum or value of five hundred dollars, exclusive of costs, in a case which cannot be brought there unless the amount in dispute exclusive of costs exceeds said sum or value, he shall not be allowed costs, and the court may in its discretion award costs against him.²³ This statute applies when by the allowance of a counterclaim the amount recovered by the plaintiff is reduced to less than five hundred dollars.²⁴ The statute does not apply to a suit removed from a State court.²⁵ If the amount recovered is less than two thousand, but more than five hundred dollars, the statute does not apply, although the jurisdictional amount is now the former sum.²⁶ If there was, when the suit was brought, a reasonable expectation of the recovery of more than five hundred dollars, costs will not be awarded against the plaintiff.²⁷

¹⁶ *Emperor of Austria v. Day*, 2 Giff. 628; s. c. 3 De G. F. & J. 217.

¹⁷ *Grattan v. Appleton*, 3 Story, 755; *Rose v. Calland*, 5 Ves. 186.

¹⁸ *Rose v. Calland*, 5 Ves. 186; *White v. Foljambe*, 11 Ves. 337; *Willcox v. Bel- laers*, T. & R. 491.

¹⁹ *Burrowes v. Lock*, 10 Ves. 470.

²⁰ *Lillia v. Airey*, 1 Ves. Jr. 277; *Shales v. Barrington*, 1 P. Wms. 481; *Drybutter v. Bartholomew*, 2 P. Wms. 127.

²¹ *Fargo v. South Eastern Ry. Co.*, 28 Fed. R. 906.

²² *Sawyer v. Kellogg*, 9 Fed. R. 601.

²³ U. S. R. S. § 968.

²⁴ *Hamilton v. Baldwin*, 41 Fed. R. 429.

²⁵ *Field v. Schell*, 4 Blatchf. 435; *Ellis v. Jarvis*, 3 Mason, 457; *Kreager v. Judd*, 5 Fed. R. 27.

²⁶ *Eastman v. Sherry*, 37 Fed. R. 844; *Johnson v. Watkins*, 40 Fed. R. 187.

²⁷ *Gibson v. Memphis, &c. R. Co.*, 31 Fed. R. 553. For the rule under the practice at common law in Tennessee, see *Johnson v. Mississippi & T. R. Co.*, 31 Fed. R. 551.

In suits to adjust claims against the United States, costs cannot be allowed unless the government puts in issue the right of the plaintiff to recover; and then only in the discretion of the court.²⁸ Costs in such a suit include only "what is actually incurred for witnesses and summoning the same, and fees paid to the clerk of the court."²⁹ No costs are allowed against the United States in a suit to recover a penalty or forfeiture accruing under any law providing for the internal revenue, when the suit was brought by the government on information received from any person other than a collector, deputy collector, or inspector of internal revenue.³⁰ No costs are awarded for or against the United States in the Supreme Court or in the Circuit Courts of Appeals.³¹

When upon a reference the master reports in favor of the plaintiff for nominal damages, the award of costs is in the discretion of the court, and depends upon the peculiar circumstances of each case.³²

The successful party to a suit may also be obliged to pay costs to an opponent who has not acted unconscientiously, in three classes of cases: when the successful party has acted unconscientiously in the suit or in the matters which gave rise to it;³³ when a defendant has been necessarily made a party to a suit in which he has no direct personal interest, — for example, an heir-at-law, who is a passive defendant to a suit to prove a will;³⁴ and when a bill is filed to redeem a pledge or relieve an estate from the burden of a mortgage or other incumbrance.³⁵ In cases where the finally successful party is obliged without his fault to pay costs to one of the others, if the suit was made necessary by the misconduct of one of the defendants, the latter is obliged to repay the amount of those costs to the first.³⁶ Thus, the costs paid out of the fund to the plaintiff in a suit of interpleader are usually decreed to be repaid by the unsuccessful defendant.³⁷ In suits founded upon

²⁸ 24 St. at L. ch. 359, p. 508, § 15.

²⁹ 24 St. at L. ch. 359, p. 508, § 15.

³⁰ U. S. R. S. § 969.

³¹ Supreme Court Rule 24; Circuit Court of Appeals Rule 31.

³² *Calkins v. Bertrand*, 8 Fed. R. 755; *Everest v. Buffalo Lubricating Oil Co.*, 31 Fed. R. 742; *Hill v. Smith*, 32 Fed. R. 753; *Kirk v. DuBois*, 46 Fed. R. 486.

³³ *Wright v. Howard*, 1 Sim. & S. 190.

³⁴ *Crew v. Joliff*, Prec. in Ch. 93; *Luxton v. Stephens*, 3 P. Wms. 373.

³⁵ *Taner v. Ivie*, 2 Ves. Sen. 466, 468.

³⁶ *Martinus v. Helmuth*, 2 V. & B. 412, *note*. See *Brodie v. St. Paul*, 1 Ves. Jr. 326; *Badeau v. Rogers*, 2 Paige Ch. (N. Y.) 209.

³⁷ *Martinus v. Helmuth*, 2 V. & B. 412, *note*; *Badeau v. Rogers*, 2 Paige Ch. (N. Y.) 209. But see *Ferguson v. Dent*, 46 Fed. R. 88; *infra*, § 334.

letters-patent for inventions, when the patentee has claimed in his specification that he was the original inventor of more than he did first invent, he cannot recover costs unless he has filed a proper disclaimer in the Patent Office before the commencement of the suit.³⁸ When an action at law or suit in equity is dismissed in the court of first instance for want of jurisdiction over the person of the defendant or over the subject-matter, or for a lack of the requisite difference of citizenship, no costs are allowed.³⁹ When a case removed from a State court is remanded for want of jurisdiction in the Circuit Court, the right to costs is secured by the bond filed with the petition for the removal.⁴⁰ When a case was begun in a State court and afterwards removed, in the districts of Michigan costs accrued in the State court before the removal may be taxed.⁴¹ In the Second Circuit such costs are not allowed.⁴² No costs are usually granted in a case in the Circuit Court where the judges are divided.⁴³ In an appellate court, when a judgment or decree is reversed for want of jurisdiction in the court below, costs are imposed upon the party who sought the jurisdiction of the court below, either by original process or by removal, whether he is respondent or appellant.⁴⁴ When an appeal or writ of error is dismissed for want of jurisdiction, costs of the motion, including the clerk's fee for printing and supervising the record, may be taxed.⁴⁵ When both parties appeal, and the decree is in all respects affirmed, usually no costs of the appeal are allowed.⁴⁶

§ 328. *Classification of Costs.*—Different principles regulate the amount of costs according as they are decreed to be paid by one party to another, or out of a fund in court.¹ In the former

³⁸ U. S. R. S. § 4922; *Proctor v. Brill*, 16 Fed. R. 791.

³⁹ *Burnham v. Rangeley*, 2 W. & M. 417; *Pentlarge v. Kirby*, 20 Fed. R. 898. But see *U. S. v. Treadwell*, 15 Fed. R. 532; *Cooper v. New Haven Steamboat Co.*, 18 Fed. R. 588.

⁴⁰ See § 3 of Judiciary Act of 1875, as amended in 1887; 24 St. at L. ch. 373.

⁴¹ *Wolf v. Insurance Co.*, 1 Flippin, 377; *Cleaver v. Trader's Ins. Co.*, 40 Fed. R. 863. See *Central Trust Co. v. Central Iowa Ry. Co.*, 38 Fed. R. 863.

⁴² *Chadbourne v. German American Ins. Co.*, 31 Fed. R. 625; *Clare v. National City Bank*, 14 Blatchf. 445.

⁴³ *Veazie v. Williams*, 3 Story, 611, 632.

⁴⁴ *Mansfield C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379; *Continental Insurance Co. v. Rhoads*, 119 U. S. 237; *Peper v. Fordyce*, 119 U. S. 469; *Everhart v. Huntsville College*, 120 U. S. 223; *King Bridge Co. v. Otoe County*, 120 U. S. 225; *Peninsula Iron Co. v. Stone*, 121 U. S. 631; *Chapman v. Barney*, 129 U. S. 677.

⁴⁵ *Bradstreet Company v. Higgins*, 114 U. S. 262; *Circuit Court of Appeals Rule 23*.

⁴⁶ *The William Cox*, 9 Fed. R. 672.

§ 328. ¹ *Trustees v. Greenough*, 105 U. S. 527; *Central R. R. v. Pettus*, 113 U. S. 116.

case costs are said to be taxed as between party and party, in the latter as between solicitor and client.²

§ 329. **Costs as between Party and Party.** — Costs as between party and party are regulated by statute. They are the amount of the "bill of fees of the clerk, marshal, and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials."¹

§ 330. **Attorney's Fees.** — The Revised Statutes fix the following sums to be taxed as attorney's fees in a bill of costs between party and party: "On a trial before a jury, in civil or criminal causes, or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars, provided that in cases of admiralty and maritime jurisdiction, where the libellant recovers less than fifty dollars, the docket fee of his proctor shall be but ten dollars. In cases at law, when judgment is rendered without a jury, ten dollars. In cases at law, when the cause is discontinued, five dollars. For *scire facias* and other proceedings on recognizances, five dollars. For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents. For services rendered in cases removed from a District to a Circuit Court by writ of error or appeal, five dollars."¹

It has been held that a docket fee can be taxed for each hearing before the court after bill, answer, and replication have been filed,² but not for a hearing upon a demurrer which is overruled, when the defendant has leave to answer and an answer is filed.³ When a demurrer is sustained, a docket fee is allowed.⁴ When a motion to remand is granted, a docket fee is allowed.⁵ To constitute "a final hearing in equity or admiralty," there must be a hearing of the cause upon its merits.⁶ No docket fee is allowed for a hearing upon an interlocutory application.⁷ When a bill is

² *Trustees v. Greenough*, 105 U. S. 527; *Central R. R. v. Pettus*, 113 U. S. 116.

§ 329. ¹ U. S. R. S. § 983. But see *Spaulding v. Tucker*, 2 Sawyer, 50.

§ 330. ¹ U. S. R. S. § 824. The same and the three following sections also regulate the fees of district attorneys. Besides the cases elsewhere cited, see *Bashaw v. U. S.* 47 Fed. R. 40.

² *American Diamond Rock Boring Co. v. Sheldon*, 28 Fed. R. 217.

³ *McLean v. Clark*, 23 Fed. R. 861.

⁴ *Price v. Coleman*, 22 Fed. R. 694.

⁵ *Josslyn v. Phillips*, 29 Fed. R. 481.

⁶ *Wooster v. Handy*, 23 Fed. R. 49; *Goodyear D. V. Co. v. Osgood*, 2 B. & A. Pat. Cas. 529; *Coy v. Perkins*, 13 Fed. R. 111; *Yale Lock Manuf. Co. v. Colvin*, 14 Fed. R. 269. *Contra*, *Goodyear v. Sawyer*, 17 Fed. R. 2.

⁷ *Doughty v. West, B. & C. Manuf. Co.*, 8 Blatchf. 107; *Central Trust Co. v. Wash.*, St. L. & P. R. Co., 32 Fed. R. 684.

dismissed without a hearing no docket fee is allowed.⁸ When a bill is taken as confessed, there must be a hearing before the decree, and consequently the complainant is entitled to tax a docket fee.⁹ It has been held that no docket fee will be allowed on the dismissal of a bill for want of prosecution;¹⁰ nor for a reference upon a motion for an interlocutory injunction;¹¹ nor for a hearing upon a petition for leave to intervene;¹² nor when the complainant has the bill dismissed upon his own motion before a final hearing;¹³ nor for a trial at which the jury disagreed.¹⁴ It has been said that "the fee is taxable whenever the trial is entered upon by the swearing of a jury in a common-law case, or by the introduction of testimony or the final opening of the argument upon a final hearing in equity or admiralty. The fee is not made by the statute to depend upon a judgment or decree, but is taxable on a trial or final hearing. As the labor for which the docket fee is supposed to be a compensation is performed on or before the trial, equitably the party ought not to lose the benefit of it by a discontinuance entered after the trial or hearing has begun."¹⁵ In a case where, after an interlocutory decree requiring the defendant to account, the plaintiff moved for a dismissal of his bill, he was obliged to pay the defendant a docket fee as well as other costs.¹⁶ Where several suits by the same plaintiffs against different defendants were submitted and tried together before referees, a docket fee in each case was allowed.¹⁷ It has been said that no docket fee should be allowed when the attorney who appeared and acted

⁸ *Wooster v. Handy*, 23 Fed. R. 49; *Goodyear D. V. Co. v. Osgood*, 2 B. & A. Pat. Cas. 529; *Coy v. Perkins*, 13 Fed. R. 111; *Yale Lock Manuf. Co. v. Colvin*, 14 Fed. R. 269. *Contra*, *Goodyear v. Sawyer*, 17 Fed. R. 2.

⁹ *Andrews v. Cole*, 20 Fed. R. 410.

¹⁰ *Wooster v. Handy*, 23 Fed. R. 49; *Wighton v. Brainerd*, 28 Fed. R. 29.

¹¹ *Doughty v. W. B. & C. Manuf. Co.*, 8 Blatchf. 107.

¹² *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. R. 684; *Mo. Pac. Ry. Co. v. Texas & P. Ry. Co.*, 38 Fed. R. 775.

¹³ *Coy v. Perkins*, 13 Fed. R. 111; *Yale Lock Manuf. Co. v. Colvin*, 14 Fed. R. 269; *Wooster v. Handy*, 23 Fed. R. 49; *Cahn v. Qung Wah Lung*, 28 Fed. R. 396; *Ryan v. Gould*, 32 Fed. R. 754; *N. Y. B.*

& P. Co. v. N. J. C. S. & R. Co., 32 Fed. R. 755. *Contra*, *Goodyear v. Sawyer*, 17 Fed. R. 2.

¹⁴ *Cleaver v. Traders' Ins. Co.*, 40 Fed. R. 863; *Dedekam v. Vose*, 3 Blatchf. 77, 153; *Troy Iron & Nail Factory v. Corning*, 7 Blatchf. 16; *Strafer v. Carr*, 6 Fed. R. 466; *Huntress v. Town of Epsom*, 15 Fed. R. 732. But see *Schmieder v. Barney*, 19 Blatchf. 143; s. c. 7 Fed. R. 451; *Wooster v. Handy*, 23 Fed. R. 49. It has been held that in such a case a district attorney may collect the docket fee from the United States. *Van Hoorebeke v. U. S.*, 46 Fed. R. 456.

¹⁵ *The Bay City*, 3 Fed. R. 47, *per Mr. Justice Brown*.

¹⁶ *Goodyear v. Sawyer*, 17 Fed. R. 2.

¹⁷ *Switzer v. Home Ins. Co.*, 46 Fed. R. 50.

for the successful party throughout the case was not admitted to practise in the court where the case was pending, nor admitted to practise in the Supreme Court of the United States before the filing of the general replication.¹⁸ No docket fee is allowed to a party, not an attorney, who conducts his own case.¹⁹

The fee for taking a deposition is only allowed for a deposition taken *de bene esse* for use in the final hearing;²⁰ not for oral testimony in court;²¹ nor, perhaps, for a deposition taken before a master or examiner;²² nor for a deposition taken for use upon an interlocutory application, such as an application for leave to intervene or a hearing upon the intervenor's claim,²³ or an application for an interlocutory injunction,²⁴ or an application to punish a person for a contempt.²⁵ In a case where the deposition of a witness who lived more than one hundred miles from the place of trial had been taken *de bene esse* by the plaintiff, and subsequently the defendant persuaded him to appear upon the trial, so that the deposition was not read in evidence: the fee for and the expense of taking the deposition were allowed to be taxed by plaintiff.²⁶ When the testimony of several witnesses is taken by the same officer and returned to court under the same enclosure, the testimony of each witness is considered as a separate deposition.²⁷ As to the taxation of the fee for taking a deposition which is admitted in evidence in several suits, the decisions are not harmonious. It seems settled that when, by stipulation, a deposition is taken once for use in several suits, in each of which it is entitled, and in each of which the witness is sworn, a deposition fee may be taxed in each suit.²⁸ Where, however, a deposition taken in one suit is by stipulation read in another, the rule, except

¹⁸ *Goodyear D. V. Co. v. Osgood*, 13 Off. Gaz. 325.

¹⁹ *Gorse v. Parker*, 36 Fed. R. 840.

²⁰ *Wooster v. Hanly*, 23 Fed. R. 49, 57; *In re Strauss v. Meyer*, 22 Fed. R. 467; *Tuck v. Olds*, 29 Fed. R. 883; *Troy Iron & Nail Factory v. Corning*, 7 Blatchf. 16.

²¹ *Troy Iron & Nail Factory v. Corning*, 7 Blatchf. 16.

²² *In re Strauss v. Meyer*, 22 Fed. R. 467; *Tuck v. Olds*, 29 Fed. R. 883; *Mo. Pac. Ry. Co. v. Texas & P. Ry. Co.*, 38 Fed. R. 775. In the Second and Sixth Circuits such deposition fees are taxable. *Ingham v. Pierce*, 37 Fed. R. 647; *Hake v.*

Brown, 44 Fed. R. 734; *Ferguson v. Dent*, 46 Fed. R. 88.

²³ *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 32 Fed. R. 684; *Mo. Pac. Ry. Co. v. Texas & P. Ry. Co.*, 38 Fed. R. 775.

²⁴ *Simpson v. Brooks*, 3 Blatchf. 456.

²⁵ *Spill v. Celluloid Manuf. Co.*, 28 Fed. R. 870.

²⁶ *Hunter v. International Ry. Imp. Co.*, 28 Fed. R. 842.

²⁷ *Broyles v. Buck*, 37 Fed. R. 137.

²⁸ *Wooster v. Handy*, 23 Fed. R. 49, 63; *Archer v. Hartford Fire Ins. Co.*, 31 Fed. R. 660; *Green v. French*, 5 N. J. L. J. 228.

in the district of Tennessee²⁹ and perhaps in that of New Jersey,³⁰ would seem to be that the fee can only be taxed in the first suit.³¹ The expenses of taking the deposition cannot be deducted from the attorney's fee.³² It has been held that the fee cannot be taxed in favor of a party who did not appear by an attorney at the taking of the deposition.³³ The attorney's costs belong to the party, not to his attorney, and proceedings to collect them should be taken in the name of the party.³⁴ In the absence of a special agreement, however, the value of the attorney's services to his client will be considered as worth at least the taxable costs.³⁵

The Revised Statutes further provide that there shall be allowed to a district attorney fees from the United States as follows: "For examination by a district attorney, before a judge or commissioner of persons charged with crime, five dollars a day for the time necessarily employed. For each day of his necessary attendance in a court of the United States on the business of the United States, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term. For travelling from the place of his abode to the place of holding any court of the United States in his district, or to the place of any examination before a judge or commissioner, of a person charged with crime, ten cents a mile for going and ten cents a mile for returning. When an indictment for crime is tried before a jury and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee, in proportion to the importance and difficulty of the cause, not exceeding thirty dollars."³⁶ "There shall be taxed and paid to every district attorney two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceedings."³⁷

"No fee shall accrue to any district attorney on any bond left

²⁹ *Jerman v. Stewart*, 12 Fed. R. 271; *Archer v. Hartford Fire Ins. Co.*, 31 Fed. R. 650.

³⁰ *Green v. French*, 5 N. J. L. J. 228.

³¹ *Wooster v. Handy*, 23 Fed. R. 49, 58; *Am. Diamond R. B. Co. v. Sheldon*, 28 Fed. R. 217; *Winegar v. Cahn*, 29 Fed. R. 676; *Cary v. Lovell Manuf. Co.*, 39 Fed. R. 163.

³² *Broyles v. Buck*, 37 Fed. R. 137.

³³ *Winegar v. Cahn*, 29 Fed. R. 676.

³⁴ *Broyles v. Buck*, 37 Fed. R. 137.

³⁵ *Celluloid Manuf. Co. v. Chandler*, 27 Fed. R. 9.

³⁶ U. S. R. S. § 824.

³⁷ U. S. R. S. § 825.

with him for collection, or in a suit commenced on any bond for the renewal of which provision is made by law, unless the party neglects to apply for such renewal for more than twenty days after the maturity of the bond.”³⁸ “When a district attorney appears by direction of the Secretary or Solicitor of the Treasury, on behalf of any officer of the revenue in any suit against such officer, for any act done by him, or for the recovery of any money received by him and paid into the Treasury in the performance of his official duty, he shall receive such compensation as may be certified to be proper by the court in which the suit is brought, and approved by the Secretary of the Treasury.”³⁹ “The district attorney and prize-commissioners, except the naval officer, shall be allowed a just and suitable compensation for their respective services in each prize-cause, to be adjusted and determined by the court, and to be paid as costs in the cause.”⁴⁰

“Each district attorney and prize-commissioner, except the naval officer, shall render to the Attorney-General an annual account of all sums he shall have received for all services in prize-causes within the previous year; and the district attorney shall be allowed to retain therefrom a sum not exceeding three thousand dollars a year, in addition to the maximum compensation allowed to be retained by him, under the provisions of Title xiii., ‘The Judiciary,’ or in addition to any salary he may receive in lieu of such maximum compensation; and each such prize-commissioner shall be allowed to retain a sum not exceeding three thousand dollars a year, which shall be in full for all his official services in prize-causes; and any excess over those respective amounts shall be paid by the officer receiving the same into the Treasury of the United States, and shall be credited to the fund for paying naval pensions.”⁴¹

“The court may allow such compensation as it deems just under the circumstances of each case to any special counsel for captors, not being the district attorney or any of his assistants, whether appointed by an Executive Department or by captors, for services actually rendered in the cause, to be paid as costs, in whole or in part, either from the entire fund or from the portion awarded to the captors; but no such allowance shall be

³⁸ U. S. R. S. § 826.

³⁹ U. S. R. S. § 827.

⁴⁰ U. S. R. S. § 4646.

⁴¹ U. S. R. S. § 4647; *The Anna, Blatch. Prize Cases*, 337.

made except for services rendered on matters as to which the party the counsel represents has an adverse interest to the United States, or an interest otherwise proper in the opinion of the court to be represented by special counsel, or for services rendered in a contestation between parties claiming to participate in the distribution of the proceeds.”⁴²

“Fees of special counsel in prize-cases, incurred or authorized by any Department, or for the defence of captors, against demands for damages made by claimants in the district court, not paid by claimants, nor from the prize-fund in the particular cause, and audited and allowed by the Department incurring or authorizing them, and by the Solicitor of the Treasury, shall be a charge upon, and paid out of, the funds appropriated for defraying the expenses of suits in which the United States is a party or interested.”⁴³

“The Attorney-General shall, whenever in his opinion the public interest requires it, employ and retain, in the name of the United States, such attorneys and counsellors-at-law as he may think necessary to assist the district attorneys in the discharge of their duties, and shall stipulate with such assistant attorneys and counsel the amount of compensation, and shall have supervision of their conduct and proceedings.”⁴⁴

“Every attorney or counsellor who is specially retained, under the authority of the Department of Justice, to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of such Department, as a special assistant to the Attorney-General, or to some one of the district attorneys, as the nature of the appointment may require; and shall take the oath required by law to be taken by the district attorneys, and shall be subject to all the liabilities imposed upon them by law.”⁴⁵

“No compensation shall hereafter be allowed to any person, besides the respective district attorneys and assistant district attorneys, for services as an attorney or counsellor to the United States, or to any branch or Department of the Government thereof, except in cases specially authorized by law, and then only on the certificate of the Attorney-General that such services were actually rendered, and that the same could not be performed by the

⁴² U. S. R. S. § 4648.

⁴³ U. S. R. S. § 4649.

⁴⁴ U. S. R. S. § 363.

⁴⁵ U. S. R. S. § 366.

Attorney-General, or Solicitor-General, or the officers of the Department of Justice, or by the district attorneys.”⁴⁶

“All suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury.”⁴⁷

“Whenever the head of a Department or Bureau gives the Attorney-General due notice that the interests of the United States require the service of counsel upon the examination of witnesses touching any claim, or upon the legal investigation of any claim, pending in such Department or Bureau, the Attorney-General shall provide for such service.”⁴⁸

“It shall be [the] duty of every district attorney to whom any collector of customs, or of internal revenue, shall report, according to law, any case in which any fine, penalty, or forfeiture has been incurred in the district of such attorney for the violation of any law of the United States relating to the revenue, to cause the proper proceedings to be commenced and prosecuted without delay, for the fines, penalties, and forfeitures in such case provided, unless, upon inquiry and examination, he shall decide that such proceedings cannot probably be sustained, or that the ends of public justice do not require that such proceedings should be instituted; in which case he shall report the facts in customs cases to the Secretary of the Treasury, and in internal revenue cases to the Commissioner of Internal Revenue, for their direction. And for the expenses incurred and services rendered in all such cases, the district attorney shall receive and be paid from the Treasury such sum as the Secretary of the Treasury shall deem just and reasonable, upon the certificate of the judge before whom such cases are tried or disposed of: Provided, That the annual compensation of such district attorney shall not exceed the maximum amount prescribed by law, by reason of such allowance and payment.”⁴⁹

“No *per diem* or other allowance shall be made to any district attorney, clerk of a Circuit Court, clerk of a District Court, mar-

⁴⁶ U. S. R. S. § 365.

⁴⁸ U. S. R. S. § 364.

⁴⁷ U. S. R. S. § 380; *Frelinghuysen v. Baldwin*, 12 Fed. R. 395; *Kennedy v. Gibson*, 8 Wall. 498; *Gibson v. Peters*, 35 Fed. R. 721; s. c. 36 Fed. R. 487.

⁴⁹ U. S. R. S. § 838; *Re District Attorney*, 23 Fed. R. 26; *Bashaw v. U. S.*, 47 Fed. R. 40.

shal or deputy marshal, for attendance at rule-days of a Circuit or District Court; and when the Circuit and District Courts sit at the same time no greater *per diem* or other allowance shall be made to any such officer than for an attendance on one court.”⁵⁰

“No district attorney shall be allowed by the Attorney-General to retain of the fees and emoluments of his office which he is required to include in his semi-annual return, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury Department, a sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year.”⁵¹

“There shall be paid to the district attorney for the Southern District of New York, in addition to his salary, at the rate of six thousand dollars a year, such sum as shall be necessary, together with the costs and fees allowed him by law, to pay such amount as may be fixed by the Attorney-General for the proper expenses of his office. But nothing in this or the other section shall forbid the allowance of additional compensation for services in prize-causes, as provided in title ‘Prize.’”⁵²

“The district attorneys and marshals for the District of Oregon and Nevada shall be entitled to receive, for the like services, double the fees hereinbefore provided; but neither of them shall be allowed to retain of such fees any sum exceeding the aggregate compensation of such officer as hereinbefore provided.”⁵³

Counsel fees allowed by the court to a district attorney cannot be reduced by the Attorney-General or by the accounting officers.⁵⁴ A district attorney is not entitled to fees for obtaining warrants for the removal of prisoners arrested in one district and triable in another.⁵⁵ A district attorney is entitled to a *per diem* for attendance before a commissioner to examine poor convicts applying for discharge, and for attendance before a commissioner on days when recognizances are taken though no witnesses are examined.⁵⁶

The allowance for travel and court attendance are designed to

⁵⁰ U. S. R. S. § 831.

⁵¹ U. S. R. S. § 835.

⁵² U. S. R. S. § 836, 11 A. G. Opinions, 77.

⁵³ U. S. R. S. § 837.

⁵⁴ U. S. c. Waters, 133 U. S. 208; Bird

v. U. S., 45 Fed. R. 110; Tuthill *v.* U. S., 38 Fed. R. 538; U. S. *v.* Tuthill, 136 U. S. 652; Van Hoorebeke *v.* U. S., 46 Fed. R. 450.

⁵⁵ Bird *v.* U. S., 45 Fed. R. 110.

⁵⁶ Bird *v.* U. S., 45 Fed. R. 110.

reimburse court expenditures, not to compensate for services.⁵⁷ Consequently a district attorney cannot charge for travel done by his assistants and for their attendance before court commissioners although he paid such expenditures.⁵⁸ Unless they otherwise agree with the Attorney General, the assistant district attorneys must pay their travelling expenses out of their salaries.⁵⁹

Where a judgment is satisfied by deducting a judgment against the United States in another action, the money is "collected or realized" within the meaning of the statute.⁶⁰ The percentage is allowed not only in cases arising under the customs revenue laws, but also in those growing out of the internal revenue laws; and the district attorney is entitled to two *per centum* of the sum which the government receives under a compromise with a person who has been prosecuted by him.⁶¹ A suit against a surety upon a collector's bond to recover moneys due for customs duties from the revenue officer to whom they were paid, is a suit arising under the revenue laws, and the district attorney who prosecuted it is entitled to his percentage.⁶² If a proceeding *in rem* under the internal revenue laws is discontinued by direction of the proper authority, on the payment of costs by the claimant the district attorney is not entitled to a percentage on the value of the property.⁶³

For prosecuting an action to enforce a statutory lien for internal revenue taxes, the district attorney is entitled to ten *per centum* of the amount collected or realized.⁶⁴ How much will be collected or realized cannot be told until it is done, and the percentage cannot, therefore, be taxed when a judgment is entered against a defendant.⁶⁵

Under Section 838 of the Revised Statutes, providing that it shall be the duty of every district attorney to institute the proper proceedings for any fines, penalties, and forfeitures which may have been incurred by reason of the violation of the internal revenue laws, unless he shall decide that the ends of justice do not require such proceedings, in which case he shall report the facts,

⁵⁷ *Townsend v. U. S.*, 22 Ct. of Cl. 207.

⁵⁸ *Townsend v. U. S.*, 22 Ct. of Cl. 207.

⁵⁹ *Townsend v. U. S.*, 22 Ct. of Cl. 207, 213; U. S. R. S. § 363.

⁶⁰ *U. S. v. One Horse*, 7 Ben. 405; *Beckwith v. U. S.*, 16 Court of Claims 250.

⁶¹ *U. S. v. 500 Barrels of Whiskey*, 2 Bond, 7.

⁶² *Beckwith v. U. S.*, 16 Ct. of Cl. 250.

⁶³ 11 A. G. Op. 329.

⁶⁴ *Bliss v. U. S.*, 37 Fed. R. 191.

⁶⁵ *King v. U. S.*, 99 U. S. 229, 234; 11 A. G. Op. 393.

and that for the expenses incurred and services rendered in all such cases he shall be paid as therein provided. The district attorney is not entitled to recover for services unless prosecutions have been commenced.⁶⁶

Under Section 824 of the Revised Statutes, providing for the compensation of district attorneys for the examination before a judge or commissioner of persons charged with crime, the district attorney is entitled to his "*per diem*" fee for time necessarily spent in the investigation of an offense in co-operation with the commissioner before the arrest is actually made and witnesses are sworn.⁶⁷ The district attorney is entitled to compensation for time actually and necessarily spent upon an arraignment before the commissioner, though no witnesses are examined, the magistrate having adjourned the hearing on motion of the accused.⁶⁸ Compensation is recoverable for the actual examination of the accused upon an application to take the poor convict's oath.⁶⁹ A district attorney is entitled to a *per diem* fee for attendance before a commissioner to examine poor convicts applying for discharge, and for attendance before a commissioner on days when recognizances are taken, though no witnesses are examined.⁷⁰ A district attorney is not entitled to fees for obtaining warrants for the removal of prisoners arrested in one district and triable in another.⁷¹ A district attorney who does two days' work in one is not entitled to a double fee.⁷² For services resulting in a discontinuance before a commissioner the district attorney is to be paid under the "*per diem*" clause of the statute, and not under the clause prescribing the fee for a discontinuance.⁷³ Where the accused is bound over by the commissioner to the District Court, and the commissioner's record is sent to that court and docketed, a fee is recoverable for a discontinuance, although no information has been filed.⁷⁴ Where the commissioner's record and bail-bond are returned to court, and an indictment is drawn, but rejected by the grand jury, a fee is recoverable for a discontinuance.⁷⁵ For services rendered by a district attorney in securing a compromise of a civil suit brought in favor of the United States, whereby the suit is dismissed without trial, he is only entitled to the fee of

⁶⁶ *Stanton v. U. S.*, 37 Fed. R. 252.

⁶⁷ *Stanton v. U. S.*, 37 Fed. R. 252.

⁶⁸ *Stanton v. U. S.*, 37 Fed. R. 252.

⁶⁹ *Stanton v. U. S.*, 37 Fed. R. 252.

⁷⁰ *Bird v. U. S.*, 45 Fed. R. 110.

⁷¹ *Bird v. U. S.*, 45 Fed. R. 110.

⁷² *Stanton v. U. S.*, 37 Fed. R. 252.

⁷³ *Stanton v. U. S.*, 37 Fed. R. 252.

⁷⁴ *Stanton v. U. S.*, 37 Fed. R. 252.

⁷⁵ *Stanton v. U. S.*, 37 Fed. R. 252.

five dollars allowed for a discontinuance.⁷⁶ An order remitting a criminal case from the Circuit Court to the District Court, on motion of the district attorney, is not a judgment within the meaning of Section 824 of the Revised Statutes.⁷⁷

Under Section 824 of the Revised Statutes, providing that where an indictment "is tried before a jury, and a conviction is had, the district attorney may be allowed, in addition to the attorney's fees herein provided, a counsel fee in proportion to the importance and difficulty of the case, not exceeding thirty dollars," the attorney is entitled to a counsel fee in a case where the defendant pleads not guilty, and the prosecution produces its evidence, even though the defendant offers no evidence, or then consents to a verdict of guilty.⁷⁸ A district attorney may recover the docket fee of twenty dollars in a case where the jury disagree.⁷⁹ An attachment for a contempt is an independent proceeding in which the statutory fees are allowed.⁸⁰

When a district attorney goes from the place where he is engaged in court to a hearing before a commissioner he is entitled to his mileage for the whole distance, if such distance is less than that from his home to the place where the commissioner sits.⁸¹

A district attorney is entitled to recover for clerk hire and for necessary expenses of the office, such as telegrams and printing and stationery ;⁸² and stenographers' charges for taking and transcribing the testimony in a criminal case ;⁸³ but he cannot recover fees paid by him to the clerk of a court of the United States.⁸⁴ Such clerk must collect his fees from the Treasury Department.⁸⁵ Under Section 846 of the Revised Statutes, providing that where the ministerial officers of the United States shall incur extraordinary expense in executing the laws thereof, the payment of which is not specifically provided for, the President is authorized to allow the payment thereof, an action will not lie for money paid out by a district attorney to prevent the escape of an alleged criminal, where no allowance has been made by the President.⁸⁶

⁷⁶ *Stanton v. U. S.*, 37 Fed. R. 252.

⁷⁷ *Stanton v. U. S.*, 37 Fed. R. 252.

⁷⁸ *Tuthill v. U. S.*, 38 Fed. R. 538; *U. S. v. Tuthill*, 136 U. S. 652, mem.

⁷⁹ *Van Hoorebeke v. U. S.*, 46 Fed. R. 456.

⁸⁰ *Van Hoorebeke v. U. S.*, 46 Fed. R. 456.

⁸¹ *Van Hoorebeke v. U. S.*, 46 Fed. R. 456.

⁸² *Stanton v. U. S.*, 37 Fed. R. 252.

⁸³ *Fish v. U. S.*, 36 Fed. R. 677.

⁸⁴ *Stanton v. U. S.*, 37 Fed. R. 252.

⁸⁵ *Stanton v. U. S.*, 37 Fed. R. 252.

⁸⁶ See *infra*, § 331.

⁸⁶ *Stanton v. U. S.*, 37 Fed. R. 252.

The Act of March 3, 1887, provides that no district attorney, clerk, or marshal shall receive any *per diem* compensation for attendance in court "except for days when the court is open by the judge for business, or business is actually transacted in court, and when they attend under Sections 583, 584, 671, 672, and 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts."⁸⁷ The method of adjusting the accounts of district attorneys is described in the following Section on Clerk's Fees.⁸⁸

§ 331. **Clerk's Fees.**—The fees of the clerk of the Supreme Court are fixed by rule as follows: "For docketing a case and filing and indorsing the transcript of the record, five dollars. For entering an appearance, twenty-five cents. For entering a continuance, twenty-five cents. For filing a motion, order, or other paper, twenty-five cents. For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words. For transferring each case to a subsequent docket and indexing the same, one dollar. For entering a judgment or decree, one dollar. For every search of the records of the court, one dollar. For a certificate and seal, two dollars. For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid. For an admission to the bar and certificate under seal, ten dollars. For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing, and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio. For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing. For issuing a writ of error and accompanying papers, five dollars. For a mandate or other process, five dollars. For filing briefs, five dollars for each party appearing. For every copy of any opinion of the court, or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy."¹ Upon moneys paid into court the clerk is allowed a commission of one per centum.² The

⁸⁷ 24 St. at L. 809.

⁸⁸ *Infra*, § 331 notes, 141-153, U. S. St. at L. ch. 443, p. 631.

R. S. §§ 839-846; 18 St. at L. 333.

§ 331. ¹ Supreme Court Rule 24; 22

² *Florida v. Anderson*, 91 U. S. 683.

compensation of the clerk of the Supreme Court is limited to six thousand dollars a year. The balance of his fees and disbursements over and above his necessary clerk hire and incidental expenses, as certified by the Supreme Court or a justice thereof appointed by it for the purpose, must be paid into the Treasury.³

In cases where a manuscript copy of the record is not furnished the printer, the fee of the clerk for his service under the last preceding paragraph is one half the rates allowed by law for making a manuscript copy, which is charged to the party bringing the cause into court, unless the court otherwise directs. When a manuscript copy is required to be made, full fees for a copy may be charged, but nothing in addition for the other services required.⁴ In all cases the clerk must deliver a copy of the printed record to each party without extra charge.

In cases of dismissal, reversal, or affirmance with costs, the fee allowed in the last paragraph is taxed against the party against whom the costs are given. In cases of dismissal for want of jurisdiction, such fees are taxed against the party bringing the cause into court, unless the court otherwise directs.⁵ The plaintiff in error or appellant, on docketing a case and filing the record, must enter into an undertaking to the clerk, with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf.⁶ When a party has printed the transcript of the record at his own expense, he may docket the case without giving security for the clerk's fees; but before the printed copies are delivered to the justices or the parties for use on the final hearing, or on any motion in the progress of the cause, the clerk can require the payment of fifteen cents a folio for attending to the correctness and proper indexing of the printed copies of the record.⁷ If the clerk demand the fees in advance, they must be paid.⁸ The proper method of collecting such costs from the parties or their sureties, is to issue an attachment against them, respectively, to compel payment of fees.⁹ When the clerk has no security for fees due to him from a party entitled to a mandate, he may withhold the mandate until his fees are paid, or he is

³ 22 St. at L. 603. See U. S. R. S. 844.

⁴ *Re Amendments to Rules*, 108 U. S. 1, 4.

⁵ *Re Amendments to Rules*, 108 U. S. 1, 4.

⁶ Supreme Court Rule 10.

⁷ *Bean v. Patterson*, 110 U. S. 401.

⁸ *Steever v. Rickman*, 109 U. S. 74.

⁹ Supreme Court Rule 10.

otherwise satisfied in that behalf.¹⁰ The salaries of the clerks of the Circuit Courts of Appeals are three thousand dollars a year, payable in equal quarterly instalments.¹¹ The fees and costs in the Circuit Courts of Appeal are the same as the fees and costs in the Superior Court.¹²

The fees of the clerks of Circuit and District Courts are fixed by statute as follows:—

“For issuing and entering every process, commission, summons, *capias*, execution, warrant, attachment, or other writ, except a writ of *venire*, or a summons or subpœna for a witness, one dollar.”¹³ In *scire facias* on a forfeited appearance bond in a criminal case, a separate notice must issue to each obligor. This is in the nature of a writ, and the clerk is entitled to his allowance for the same.¹⁴

“For issuing a writ of summons or subpœna, twenty-five cents.”¹⁵ Section 829 of the Revised Statutes requires that the clerk shall insert in each writ of subpœna the names of as many witnesses in a cause as convenience in serving will permit. Where the clerk makes the copies of the subpœnas or the subpœna tickets, and furnishes them to the marshal for service, at the request or by the acquiescence of the district attorney, the clerk is entitled to charge the government for making such copies.¹⁶ The clerk may issue separate subpœnas for witnesses in criminal cases when necessary to secure their immediate attendance.¹⁷

“For filing and entering every declaration, plea, or other paper, ten cents.”¹⁸ No paper is considered filed unless it has the proper indorsement by the clerk.¹⁹ Merely placing a paper in the court papers is no filing.²⁰ When it is necessary to enter on the calendar a note of such filing, an additional fee of fifteen cents is allowed.²¹ The clerk is entitled to ten cents for every

¹⁰ *Osborn v. United States*, 131 U. S. CXXXVII.

¹¹ 26 St. at L. ch. 517, § 2, p. 826.

¹² 26 St. at L. ch. 517, § 2, p. 827.

¹³ U. S. R. S. § 828. See *Goodrich v. U. S.*, 47 Fed. R. 267.

¹⁴ *Jones v. United States*, 39 Fed. R. 410.

¹⁵ U. S. R. S. § 828.

¹⁶ *Erwin v. United States*, 37 Fed. R. 470; *United States v. Van Duzee*, 140 U. S. 169, 176.

¹⁷ *Jones v. United States*, 39 Fed. R. 410.

¹⁸ U. S. R. S. § 828.

¹⁹ *Erwin v. U. S.*, 37 Fed. R. 470, 484; *Henry Amy & Co. v. Shelby County*, 1 Flippin, 104.

²⁰ *Erwin v. U. S.*, 37 Fed. R. 470, 484; *Henry Amy & Co. v. Shelby County*, 1 Flippin, 104.

²¹ *Erwin v. U. S.*, 37 Fed. R. 470, 484; *Henry Amy & Co. v. Shelby County*, 1 Flippin, 104.

separate voucher filed by him, though such vouchers are filed with his report of moneys on hand.²² Charges for filing *præcipes* for bench-warrants are proper, since it is the practice for the clerk to wait for instructions from the district attorney, in the form of a *præcipe*, before issuing such warrants, and to file the *præcipes*.²³ After sentence, no *præcipe* for commitment is necessary, and no allowance should be made for filing them.²⁴ The clerk is entitled to fees from the United States for filing each separate voucher covered by the marshal's account with the government.²⁵ The clerk is entitled to a fee of ten cents for filing each separate voucher returned by the marshal with his accounts.²⁶ It is the clerk's duty to file the appointments of deputy-marshals, and record their oaths of office, and he is entitled to receive the fees therefor from the government, whether or not the government can reimburse itself from the officers.²⁷ Though the expense of taking the oaths and executing the bonds of deputy-marshals, jury commissioners, bailiffs, district attorneys, and their assistants must be paid by themselves, the fees for filing them are chargeable against the government.²⁸ The expense of approving their accounts must be paid by the United States, and the clerk may collect from the United States his fees for entering the orders of approval, and for certified copies of the same when required.²⁹ "Discharged tickets," issued out of the district attorney's office, officially notifying the clerk that certain government witnesses are no longer required, are properly filed by the clerk as "other papers," within Section 828 of the Revised Statutes, and he is entitled to collect the specified fee therefor.³⁰ The clerk of the District Court is entitled to fees from the government for filing separately, in criminal cases, the process or copy of process, the bail bond, and the recognizance of witnesses sent up by the commissioner,³¹ for entering an order for trial and recording a verdict in a criminal case.³² The clerk can charge for filing each separate paper sent up by the commissioners after the hearing in criminal cases, and for filing each separate account of deputy-

²² *Goodrich v. U. S.*, 35 Fed. R. 193.

²⁸ *U. S. v. Van Duzee*, 140 U. S. 169.

²³ *Van Duzee v. U. S.*, 41 Fed. R. 571;
U. S. v. Van Duzee, 140 U. S. 169.

²⁹ *U. S. v. Van Duzee*, 140 U. S. 169.

²⁴ *U. S. v. Van Duzee*, 140 U. S. 169.

³⁰ *Taylor v. U. S.*, 45 Fed. R. 531;
Goodrich v. U. S., 47 Fed. R. 267.

²⁵ *Jones v. U. S.*, 39 Fed. R. 410.

³¹ *Jones v. U. S.*, 39 Fed. R. 410.

²⁶ *Marvin v. U. S.*, 44 Fed. R. 405.

³² *U. S. v. Van Duzee*, 140 U. S.

²⁷ *Van Duzee v. U. S.*, 41 Fed. R. 571. 169.

marshals, which are the vouchers to accounts current of the marshal.³³ Under section 828 of the Revised Statutes, allowing the clerk of the Circuit Court ten cents for "filing and entering every declaration, plea or other paper," the clerk is not required to fasten together all the papers in a case sent up by the commissioner, and file the bundle as one paper, but may file them as received; nor is he required to enter every paper that he files on the court docket, but may make the entry on any proper book kept for the purpose.³⁴ The clerk may charge for filing the oaths, bonds, and appointments of deputy-marshals, jury commissioners, bailiffs, district attorneys and their associates, attorneys to defend accused persons and supervisors of elections, when required to be entered in his office.³⁵ Under Section 1014 of the Revised Statutes, providing for the examination of persons accused of offences against the United States, before a commissioner of the Circuit Court, or other magistrate of any State, agreeably to the usual mode of process in such State, and that copies of the process shall be returned into the clerk's office, together with recognizances of witnesses for their appearance, the clerk is entitled to a filing fee for each separate paper, and not to one fee only in each case.³⁶ The clerk of the District and Circuit Courts and the Chief Supervisor of Elections should file and indorse each paper that comes into his possession officially, although pertaining to the same case or matter, and not simply the outside paper or wrapper, and he is entitled to fees for each paper filed. He is also entitled, as supervisor of elections, to fees for indexing and entering records of elections, as required by law.³⁷ If two or more depositions are embraced in a single paper, or a series of sheets attached together, they form but a single paper, within the meaning of the law.³⁸

"For administering an oath of affirmation, except to a juror, ten cents."³⁹ Affidavits of service by government witnesses are properly administered by the clerk, and he is entitled to charge therefor.⁴⁰ When blanks furnished by the department for ab-

³³ *Erwin v. U. S.*, 37 Fed. R. 470; *U. S. v. Van Duzee*, 140 U. S. 169.

³⁴ *Van Duzee v. U. S.*, 41 Fed. R. 571; *U. S. v. Van Duzee*, 140 U. S. 169.

³⁵ *U. S. v. Van Duzee*, 140 U. S. 169; *Goodrich v. U. S.*, 47 Federal Reporter, 267.

³⁶ *Taylor v. U. S.*, 45 Fed. R. 531; *U. S. v. Van Duzee*, 140 U. S. 169.

³⁷ *Dimmick v. U. S.*, 36 Fed. R. 82.

³⁸ *U. S. v. Barber*, 140 U. S. 164, 168; *per Mr. Justice Brown*.

³⁹ *U. S. R. S.*, § 828.

⁴⁰ *Taylor v. U. S.*, 45 Fed. R. 531.

stracts of payment of witnesses, etc., contain jurats, the clerk is entitled to a fee of twenty-five cents for each jurat.⁴¹ The clerk may not charge for administering the oaths of office to deputy-marshals, jury commissioners, bailiffs, district attorneys, and their assistants, or preparing their official bonds, but he may charge for filing their oaths, bonds, and appointments.⁴²

“For taking an acknowledgment, twenty-five cents.”⁴³ It has been held that the acknowledgment of the principal and sureties to a recognizance in a criminal case is a single act, and that the commissioner can charge but a single fee for the same.⁴⁴

“For taking and certifying depositions to file, twenty cents for each folio of one hundred words.”⁴⁵ Where a suit is voluntarily dismissed by the complainant, without a submission or hearing, on a settlement of the case at complainant's costs, with consent of the defendant and the attorneys of both parties, the solicitor's fees for taking depositions are not allowable; but the clerk's fees are a proper charge under a decree dismissing the case at complainant's costs.⁴⁶

“For a copy of such deposition furnished to a party on request, ten cents a folio.”⁴⁷ A party may tax the fee paid for a copy of his own deposition, for use in printing the evidence, as required by a rule.⁴⁸

“For entering any return, rule, order, continuance, judgment, decree, or recognizance, or drawing any bond, or making any record, certificate, return, or report, for each folio, fifteen cents.”⁴⁹ When, by order of the court, the clerk enters upon the minutes a proceeding in a court of official character, such as a memorial concerning the death of a public man, the fee for entering is properly chargeable to the government.⁵⁰ Where the number of words is less than one hundred, they are counted a folio; and as such entry is, in fact, a record, the departmental construction is the proper one, which gives the clerk ten cents for filing a paper, and fifteen cents for the record entry in the calendar.⁵¹ The clerk may charge fees in an equity cause, as to absent defendants, as to

⁴¹ *Marvin v. U. S.*, 44 Federal Reporter, 405.

⁴² *U. S. v. Van Duzee*, 140 U. S. 169.

⁴³ U. S. R. S., § 828.

⁴⁴ *U. S. v. Barber*, 140 U. S. 177. But see *Taylor v. U. S.*, 45 Fed. R. 531.

⁴⁵ U. S. R. S. § 828.

⁴⁶ *Cahn v. Qung Wah Lung*, 28 Fed. R. 396.

⁴⁷ U. S. R. S. § 828.

⁴⁸ *Brewster v. Shuler*, 38 Fed. R. 549.

⁴⁹ U. S. R. S. § 828.

⁵⁰ *Erwin v. U. S.*, 37 Fed. R. 470.

⁵¹ *Amy v. Shelby County*, 1 Flippin, 104.

whom the cause is continued.⁵² Where a cause, after being referred to an auditor, is, with the sanction of the court, settled by the parties, and entry made, "Dismissed, at defendant's costs, by consent," the process and pleadings in the State court, together with the proceedings for removal sent up in the transcript, and the proceedings in the Federal court, should be entered upon the final record; and the clerk may properly charge fifteen cents per folio for such entry.⁵³ A judgment is an order of the court within the meaning of the fee bill.⁵⁴ For entry of the return of a grand jury the clerk is entitled only to the statutory folio fees.⁵⁵ Orders made by the court upon the marshal to bring to court for trial prisoners who have been committed by commissioners to jails of other counties are not within the provision of Section 1030 of the Revised Statutes, that no writ is necessary to bring into court any prisoner or person in custody, but that it shall be done upon order, and that no fee can be charged therefor by the clerk or marshal. That statute relates solely to prisoners and witnesses while in attendance on court, and the clerk is entitled to charge the proper fees for making and authenticating such orders.⁵⁶ The provision of Section 828 of the Revised Statutes, giving certain fees for making dockets and indexes taxing costs, etc., in any "cause," applies to proceedings by the United States against witnesses for contempt, and such fees are a legitimate charge by the clerk.⁵⁷ The clerk is entitled to fees for entering orders of the approval of clerk's and district attorney's and marshal's and commissioner's accounts, and filing the papers with same, for swearing bailiffs, for filing venirens and precepts to distribute, and other papers, and for making the acknowledgments of sureties on recognizances.⁵⁸ The clerk's fees for entering orders approving accounts of commissioners and the district attorney, for entering reports of money paid into court, and filing vouchers pursuant to a standing order of the court and Section 798 of the Revised Statutes, for making transcripts required by 24 St. at Large, p. 507, § 10, when ordered by the district attorney, and for entering an order appointing an attorney to defend a poor person, are all chargeable to the United States.⁵⁹ Under the Act of Feb. 22, 1875,⁶⁰ the

⁵² *Ex parte Lee*, 4 Cranch C. C. 197.

⁵³ *Blain v. Home Ins. Co.*, 30 Fed. R. 667.

⁵⁴ *Blake v. Hawkins*, 19 Fed. R. 204.

⁵⁵ *Van Duzee v. U. S.*, 11 Fed. R. 571.

⁵⁶ *Taylor v. U. S.*, 15 Fed. R. 531.

⁵⁷ *Taylor v. U. S.*, 15 Fed. R. 531.

⁵⁸ *Davis v. U. S.*, 15 Fed. R. 162.

⁵⁹ *Goodrich v. U. S.*, 12 Fed. R. 392.

⁶⁰ U. S. R. S. 1 Suppl. 115, 18 St. at L. p. 333, ch. 95.

clerk of the Circuit or District Court is entitled to his legal charges for the entry of orders, and other legitimate expenses of approving the accounts of deputy-marshals, jury commissioners, bailiffs, district attorneys, and assistant district attorneys.⁶¹ Fees are properly allowed for entering orders for trial, and recording the verdict in criminal cases, as for "making a record," and these services are not covered by the docket fee.⁶² Orders of continuance from day to day in criminal trials are within Section 828 of the Revised Statutes, giving the clerk for entering any order, continuance, etc., for each folio fifteen cents.⁶³ The clerk should keep a record of an affidavit charging a crime, and a preliminary hearing, a finding probable cause, and the fixing of reasonable bail by the committing magistrate, and is entitled to a fee therefor.⁶⁴ The clerk of the United States Circuit Court for the District of New Jersey is entitled to collect from the plaintiff, in an action at law, fees for recording the proceedings and judgments therein in favor of plaintiff. Section 914 of the Revised Statutes provides that the pleadings and forms and modes of proceedings in civil causes, other than equity and admiralty, in the Circuit and District Courts of the United States, shall conform as nearly as may be to the forms and modes of procedure in like causes in the States where such courts are held. Section 76 of the New Jersey statutes provides that when any civil action shall have been determined, the clerk of court shall enter all the proceedings, including the judgment, in a book of records to be kept for that purpose.⁶⁵ The final record to be made by the clerk of all the proceedings embraces the final commitment in a criminal case, but not the preliminary bail-bond and justification of sureties taken before the commissioner, as these are proceedings of the magistrate, and not of the court.⁶⁶ Under a rule of court that in all criminal cases, unless otherwise specially ordered, the final record shall include the order made by the commissioner binding the party to appear before the grand jury, the clerk is entitled to an allowance for incorporating in the final record the transcript from the commissioner.⁶⁷ A clerk of a Circuit or District Court

⁶¹ *U. S. v. Van Duzee*, 140 U. S. 169, 171.

⁶² *U. S. v. Van Duzee*, 140 U. S. 199.

⁶³ *Taylor v. U. S.*, 45 Fed. R. 531.

⁶⁴ *Erwin v. U. S.*, 37 Fed. R. 470.

⁶⁵ *Morrison v. Bernard's Township*, 35 Fed. R. 400.

⁶⁶ *Jones v. U. S.*, 39 Fed. R. 410.

⁶⁷ *Van Duzee v. U. S.*, 41 Fed. R. 571; *U. S. v. Van Duzee*, 140 U. S. 169.

of the United States is entitled to compensation for revising the jury-box, at the rate of five dollars per day for a period not exceeding three days for a term of the court. The clerk is entitled to charge fifteen cents per folio for recording the names, residences, etc., of jurors on a record which he is required to make by a rule of court.⁶⁸ Sections 846 and 855 of the Revised Statutes require that jurors and witnesses shall be paid upon the orders of the court. When the clerk states the accounts of jurors and witnesses, taking their affidavits as to travel and attendance, and presents the accounts stated in a report to the court for its approval, he is entitled to the fee prescribed by the statute "for making any report." The original orders signed by the judge should be entered of record, and placed upon file by the clerk, and he is entitled to a fee of ten cents for filing each.⁶⁹ The clerk is not entitled to fees as for reports, for letters transmitting receipts of the depository for moneys, and stating the nature of the case, as the commissions of such moneys were intended to pay for these services.⁷⁰ The clerk's fees for final records in criminal cases should be in accordance with the folios which are contained in the record, and not be limited to four folios; but he is not entitled to a separate fee for entering the oral appearances of attorneys in criminal cases, as this is included in the docket fee.⁷¹ In determining the number of folios in a final record each separate and distinct order, notice, or other paper, is to be counted separately, according to the statute, providing that when there are over fifty, and under one hundred, words, it shall be counted as a folio, and the aggregate of the folios so found is the number of folios in the record.⁷² The clerk is entitled on orders of the court to pay the accounts of the marshals and officers, other than commissioners, as follows: Entering order, forty-five cents; copy, thirty cents; certificate, fifteen cents; seal, twenty cents; filing duplicate, ten cents.⁷³ The statute requires that only one copy of the commissioner's account shall be presented, which is forwarded to the Treasury Department. It has been held that a certified copy of the order of court approving it should accompany it, and that the

⁶⁸ *Erwin v. U. S.*, 37 Fed. R. 470.

⁶⁹ *Erwin v. U. S.*, 37 Fed. R. 470.

⁷⁰ *Marvin v. U. S.*, 44 Fed. R. 405. But see *Goodrich v. U. S.*, 47 Fed. R. 267.

⁷¹ *Marvin v. U. S.*, 44 Fed. R. 405.

⁷² U. S. R. S. § 854; *Erwin v. U. S.*, 37 Fed. R. 470.

⁷³ 24 St. at L. 505; *Marvin v. U. S.*, 44 Fed. R. 405.

fees should be as follows: Entering the order of approval, forty-five cents; filing same, ten cents; copy, thirty cents; certificate and seal, thirty-five cents.⁷⁴

"For a copy of any entry or record, or of any paper on file, for each folio, ten cents."⁷⁵ The clerk is entitled to ten and not fifteen cents per folio for transcripts of a record.⁷⁶ A transcript is but a copy;⁷⁷ and where the clerk makes the copy of subpoenas or subpoena tickets, and furnishes them to the marshal for service, at the request or by the acquiescence of the district attorney, the clerk is entitled to charge the government ten cents each, as for one folio, for making such copies.⁷⁸ In the Southern District of New York it has been held in several cases, not reported, that this authorizes the clerk to forbid an attorney or party to himself copy a paper in a suit, or even an opinion, without payment of the same fees as if the clerk made the copy. But the propriety of such a practice, which compels a citizen to pay a fee before he can learn the law, for disobedience to which he may be punished, is very doubtful. The clerk is not entitled to charge the United States for making for his office files, copies of reports required by department regulations to be made to the Solicitor of the Treasury, nor for keeping a record of witness certificates separate from his subpoena record.⁷⁹ Though Section 829 of the Revised Statutes, fixing the marshal's fee for service of subpoenas, forbids him to make a further charge for copy, the clerk, being required by rule of court to make copies to be left with witnesses, is entitled to an allowance therefor.⁸⁰ When the court orders the clerk to furnish a copy of an indictment to a defendant free of charge, the clerk may recover from the United States his fee for the same.⁸¹ It has been said that it is erroneous for the accounting officers to assume, as they often do, that unless some section of the Revised Statutes, or of the Statutes at Large, specifically requires work to be done, no compensation should be allowed for doing it. The court has full power and right to adopt rules regulating its procedure in criminal cases, and when, in the exercise of this un-

⁷⁴ 24 St. at L. 505; *Marvin v. U. S.*, 44 Fed. R. 405.

⁷⁵ U. S. R. S. § 828.

⁷⁶ *Cavender v. Cavender*, 3 McCrary, 383.

⁷⁷ *Cavender v. Cavender*, 3 McCrary, 383.

⁷⁸ *Erwin v. U. S.*, 37 Fed. R. 470, 490.

⁷⁹ *Jones v. U. S.*, 39 Fed. R. 410.

⁸⁰ *Van Duzee v. U. S.*, 41 Fed. R. 571; *U. S. v. Van Duzee*, 140 U. S. 169.

⁸¹ *Van Duzee v. U. S.*, 140 U. S.

doubted right, it adopts rules requiring the clerk to furnish copies of indictments, copies of subpoenas, to include certain matters in the final record, and other like requirements, the legal duty and obligation of the clerk to perform such services is as well established as though such rules formed part of the Revised Statutes. If, then, the work thus done in obedience to the rule of court falls within the character of services for which the fee-bill allows compensation, the clerk is justly and legally entitled to the statutory compensation therefor.⁸² The clerk of the District Court for Massachusetts has been allowed certain special fees for services in naturalization.⁸³

"For making dockets and indexes, issuing venire, taxing costs, and all other services, on the trial or argument of a cause where issue is joined and testimony is given, three dollars."⁸⁴ An attachment against a defaulting witness or juror, for contempt of court is an independent suit, and a "cause" for which a docket fee is chargeable under the fee-bill.⁸⁵ The clerk is required to make a final record of the proceedings in such case.⁸⁶ The allowance to the clerk of three dollars "for making dockets and indexes, issuing venire, taxing costs, and all other services on the trial or argument of a cause," does not include entering the order for trial and recording the verdict.⁸⁷ Fees for entries on the jackets in which the papers are inclosed, showing the date of the disposition of the cases, and the pages of the record where the proceedings will be found, are covered by the general charges for indexing.⁸⁸

"For making dockets and indexes, taxing costs, and all other services, in a cause where issue is joined, but no testimony is given, two dollars."⁸⁹ It has been held in the Ninth Circuit that the petitioner in an application for the writ of *habeas corpus* may be obliged to pay eleven dollars for all services in the proceeding; but that the court has discretion to allow no costs or fees in such a case.⁹⁰

"For making dockets and indexes, taxing costs, and other services, in a cause which is dismissed or discontinued, or where

⁸² *Van Duzee v. U. S.*, 41 Fed. R. 571, 578; *per Shiras, J.* See *U. S. v. Van Duzee*, 140 U. S. 169.

⁸³ *U. S. v. Hill*, 120 U. S. 169; affirming 25 Fed. R. 375.

⁸⁴ *U. S. R. S.* § 828.

⁸⁵ *Erwin v. U. S.*, 37 Fed. R. 470.

⁸⁶ *Erwin v. U. S.*, 37 Fed. R. 470.

⁸⁷ *U. S. v. Van Duzee*, 140 U. S. 199.

⁸⁸ *Van Duzee v. U. S.*, 41 Fed. R. 571.

⁸⁹ *U. S. R. S.* § 828.

⁹⁰ *In re Moy Chee Kee*, 33 Fed. R. 377.

judgment or decree is made or rendered without issue, one dollar.”⁹¹ The act allowing a fee for making “dockets, and indexes, taxing costs, and for other services in a cause which is dismissed or discontinued,” does not entitle the clerk to an allowance for docketing, indexing, and taxing costs in cases sent up from the commissioner, in which defendant was bound over to the grand jury, but where the grand jury fails to find an indictment. The cases should not be docketed until the grand jury or district attorney has taken affirmative action.⁹² Where a case is removed from one division of the district to another, the clerk cannot recover the fee allowed for “services in a cause which is dismissed or discontinued.”⁹³

“For making dockets and taxing costs, in cases removed by writ of error, or appeal, one dollar.”⁹⁴ The clerk’s fee of one dollar for filing the note of issue when placing an appeal in admiralty on the calendar, is taxable, and the clerk may charge for including the evidence in the record on the final decree in admiralty.⁹⁵ The clerk is entitled to a docket fee for a hearing by the court, on an application for a warrant for the transportation of a defendant to another district, under the provisions of section 1014 of the Revised Statutes.⁹⁶

“For affixing the seal of the court to any instrument, when required, twenty cents.”⁹⁷ The copy of an order directing the marshal under section 855 of the Revised Statutes to pay the fees of witnesses and jurors, or of writs of *mittimus*, should be authenticated by seal and certificate for which the clerk must be allowed his fees.⁹⁸ The clerk is entitled to fees for copies of orders to pay jurors and for seals for the same.⁹⁹ When the Treasury Department requires copies of orders for the payment by the marshal of sums due jurors and witnesses to be authenticated by the seal of the court, the clerk is entitled to his fee for affixing the seal, but not otherwise.¹⁰⁰

“For every search for any particular mortgage, judgment, or other lien, fifteen cents.”¹⁰¹ The clerk is entitled to a fee of ten

⁹¹ U. S. R. S. § 828.

⁹² U. S. v. Van Duzee, 140 U. S. 169, 173, 174.

⁹³ Van Duzee v. U. S., 41 Fed. R. 571.

⁹⁴ U. S. R. S. § 828.

⁹⁵ The Alice Tainter, 14 Blatchf. 225, 227.

⁹⁶ Erwin v. U. S., 37 Fed. R. 470.

⁹⁷ U. S. R. S. § 828.

⁹⁸ Taylor v. U. S., 45 Fed. R. 531.

⁹⁹ Marvin v. U. S., 44 Fed. R. 405.

¹⁰⁰ U. S. v. Van Duzee, 140 U. S. 169, 174.

¹⁰¹ U. S. R. S. § 828.

cents for filing a requisition for such a search.¹⁰² For the annual statement to the Attorney-General of the judgments, &c., for the preceding year, the clerk is entitled to compensation for the final abstract at fifteen cents per folio, and not to the regular fees for searches.¹⁰³

“For searching the records of the court for judgments, decrees, or other instruments constituting a general lien on real estate, and certifying the result of such search, fifteen cents for each person against whom such search is required to be made.”¹⁰⁴ As the statutes do not expressly provide for compensation to the clerk for searching for petitions in bankruptcy, it has been held that a reasonable compensation for such service is fifteen cents for each name against which search is made.¹⁰⁵ The clerk of the Circuit Court, instead of certifying the result of a search for liens on the original requisition delivered to him, may, and perhaps should file such requisition, and give the certificate of the result of the search on another paper. A charge of ten cents for filing such paper is proper,¹⁰⁶ and so also is a charge of fifteen cents for each person against whom a search is required to be made, as compensation for making the search, and for the act of signing the certificate and certifying the result.¹⁰⁷ A compensation of fifteen cents per folio for making the certificate is proper; but not a charge for affixing the seal of the court to such certificate, unless required.¹⁰⁸

“For receiving, keeping, and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept, and paid.”¹⁰⁹ This charge has been held to include money collected by the marshal on executions.¹¹⁰ Where an assignee in bankruptcy files a bill in the Circuit Court to settle conflicting claims to the proceeds of a sale, it is not his duty to pay the proceeds into the registry of the court; and consequently the clerk is not entitled to commissions on such money.¹¹¹ It has been held that the fact that the money is subject to the decree of the court, it not being in the court's registry, is not enough

¹⁰² *In re* Petition of Woodbury, 7 Fed. R. 705.

¹⁰³ *Marvin v. U. S.*, 44 Fed. R. 405.

¹⁰⁴ U. S. R. S. § 828.

¹⁰⁵ *Matter of Vermeule*, 10 Ben. 1.

¹⁰⁶ *Ex parte* Woodbury, 7 Fed. R. 705.

¹⁰⁷ *Ex parte* Woodbury, 7 Fed. R. 705.

¹⁰⁸ *Ex parte* Woodbury, 7 Fed. R. 705; *U. S. v. Van Duzee*, 140 U. S. 169.

¹⁰⁹ U. S. R. S. § 828.

¹¹⁰ *Fagan v. Cullen*, 28 Fed. R. 843.

¹¹¹ *Leach v. Kay*, 2 Flippin C. C. 590.

to give the clerk a right to commissions.¹¹² But a subsequent decision holds that money deposited in a bank, under a decree of the court, and subject to its order, is within the meaning of Chapter 20, of the Acts of 1793, which provides that the clerk shall be entitled to a percentage on "all money deposited in court."¹¹³ The money must either actually or constructively pass through the clerk's hands.¹¹⁴ Money received by a master in chancery in payment of property sold upon the foreclosure of a mortgage, may, in pursuance of section 995 of the Revised Statutes, be deposited with a designated depository of the United States, and the clerk is then entitled to his commissions thereon;¹¹⁵ but money paid by a bidder at such a sale as security for his compliance with his bid may by order of the court be paid in a certified check on a bank, and deposited in a trust company, and then the clerk is not entitled to a commission thereon.¹¹⁶ So a clerk who receives, keeps, and pays out money under a judgment is entitled to a commission of one per cent on the amount so received, the same to be paid by the defendant as a part of the costs.¹¹⁷

"For travelling from the office of clerk where he is required to reside to the place of holding any court required by law to be held, five cents a mile for going, and five cents a mile for returning, and five dollars a day for his attendance on the court while actually in session."¹¹⁸ A circuit court opened at the time and place appointed by law is in actual session within the meaning of this statute, although no suitors appear, and the court be adjourned to a future day without transacting any business whatever, and the clerk is entitled to his *per diem* fee of five dollars.¹¹⁹ Under Sections 2011-2014 of the Revised Statutes, providing for the opening of the Circuit Court not less than ten days prior to a registration for election or prior to the election for member of Congress, and continuing court until the day following the election, and Section 828, allowing the clerk five dollars for attendance on the court while actually in session, the clerk is entitled to such fee for every day the court is in session, under those sec-

¹¹² *Ex parte Plitt*, 2 Wall. Jr. 453,

¹¹³ *Ex parte Prescott*, 2 Gall. 146.

¹¹⁴ *Leech v. Kay*, 4 Fed. R. 72.

¹¹⁵ *Thomas v. Chicago & C. S. Ry. Co.*,
37 Fed. R. 548.

¹¹⁶ *Easton v. Houston & T. C. Ry. Co.*,
44 Fed. R. 718.

¹¹⁷ *Blake v. Hawkins*, 19 Fed. R. 204.

¹¹⁸ U. S. R. S. § 828.

¹¹⁹ *Jones v. U. S.*, 21 Ct. Cl. 1.

tions, and for his record of its proceedings.¹²⁰ When his deputy attends a session of the court, the clerk is entitled to a *per diem* fee for such attendance, even though the clerk has received a *per diem* fee for his personal attendance the same day at a session of the court at another place.¹²¹ The proviso relative to compensation for attendance of court officers in Act of August 4, 1886,¹²² was repealed by the proviso covering the same subject-matter in the Act of March 3, 1887,¹²³ providing for a *per diem* fee where "the court is opened by the judge for business, or business is actually transacted." And since the passage of the latter act it is sufficient, to entitle the clerk to his *per diem*, if the court be opened for business by the judge.¹²⁴ Under Act of August 4, 1886,¹²⁵ providing that none of the money thereby appropriated shall be used to pay clerk's *per diem* for attendance in court except for days when business was actually transacted, the burden is on the clerk to show that business was actually transacted by the court on the days for which he claims his *per diem* for attendance.¹²⁶ The clerk of a Federal court is entitled to his *per diem* fee for attending court on a day when it is adjourned, on the written order of a judge.¹²⁷ The clerk is not entitled to a fee for keeping a list of the names and residences of jurors, as this is part of the duties of a jury commissioner.¹²⁸ A clerk who is also a commissioner may charge a *per diem* fee for his attendance at court and a *per diem* fee for hearing a cause as commissioner on the same day.¹²⁹ Where a deputy clerk acts with the jury commissioner in drawing juries while the court is not in session, he is entitled to the same compensation allowed the jury commissioner for like services, where such compensation is shown to be a reasonable charge for the work performed.¹³⁰

Under the Act of June 30, 1879,¹³¹ appointing the clerk a jury commissioner *ex officio*, he is entitled to a jury commissioner's compensation for services performed as such.¹³² For the annual statement to the Attorney-General of the judg-

¹²⁰ *Pleasants v. U. S.*, 35 Fed. R. 270.

¹²¹ *Erwin v. U. S.*, 37 Fed. R. 470.

¹²² 24 St. at L. 253.

¹²³ 24 St. at L. 541.

¹²⁴ *Erwin v. U. S.*, 37 Fed. R. 470.

¹²⁵ 24 St. at L. 253.

¹²⁶ *Marvin v. U. S.*, 44 Fed. R. 405.

¹²⁷ *Pitman v. U. S.*, 45 Fed. R. 159.

¹²⁸ *Marvin v. U. S.*, 44 Fed. R. 405.

¹²⁹ *Goodrich v. U. S.*, 42 Fed. R. 392;
Erwin v. U. S., 37 Fed. R. 470.

¹³⁰ *Goodrich v. U. S.*, 42 Fed. R. 392;
Erwin v. U. S., 37 Fed. R. 470.

¹³¹ 21 St. at L. 43.

¹³² *Marvin v. U. S.*, 44 Fed. R. 405.

ments, &c., for the preceding year, the clerk is entitled to compensation for the final abstract at fifteen cents per folio, and not to the regular fees for searches.¹³³ Where a judge erred in his construction of the law, and improperly ordered the appointment of supervisors of election, the clerk is still entitled to compensation for services rendered in respect to such appointment.¹³⁴ Under the act making appropriations for the expenses of the government for the year ending June 30, 1884 (22 St. at L. 631), the clerk of the United States Supreme Court is required to pay into the treasury the fees of his office over and above expenses, and his fees should be paid in advance if demanded.¹³⁵ The disallowance by the First Comptroller of the Treasury of fees claimed by a clerk of the court is not conclusive against the clerk on a petition by him for the recovery of such fees.¹³⁶ Fees earned by the clerk in the District Court cannot be transferred by the comptroller to his account as clerk of the Circuit Court.¹³⁷ All books in the offices of the clerks of the Circuit and District Courts containing the docket or minute of the judgments, or decrees thereof, must during office hours be open to the inspection of any person desiring to examine the same, without any fees or charges therefor.¹³⁸

"No *per diem* or other allowance shall be made to any district attorney, clerk of a Circuit Court, clerk of a District Court, marshal or deputy-marshal, for attendance at rule-days, of a Circuit or District Court; and when the Circuit and District Courts sit at the same time, no greater *per diem* or other allowance shall be made to any such officer than for an attendance on one court."¹³⁹ When both Circuit and District Courts are in session on the same days, the clerk may charge his *per diem* fee in either, and the department has no discretion to transfer his charges to the account of the other court, to lessen the whole amount due him by force of the rules as to the maximum of allowance.¹⁴⁰

"Every district attorney, clerk of a District Court, clerk of a Circuit Court, and marshal, shall, on the first days of January and July, in each year, or within thirty days thereafter, make

¹³³ *Marvin v. U. S.*, 44 Fed. R. 405.

¹³⁴ *Goodrich v. U. S.*, 35 Fed. R. 193.

¹³⁵ *Steever v. Rickman*, 109 U. S. 74.

¹³⁶ *Davis v. U. S.*, 45 Fed. R. 162.

¹³⁷ *Goodrich v. U. S.*, 42 Fed. R. 392.

¹³⁸ U. S. R. S. § 828; *Re McLean*, 9 Cent. L. J. 425.

¹³⁹ U. S. R. S. § 831.

¹⁴⁰ *Goodrich v. U. S.*, 35 Fed. R. 193.

to the Attorney-General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk-hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the Bankrupt Act; and every marshal shall state separately therein the fees and emoluments received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive. Said returns shall be verified by the oath of the officer making them."¹⁴¹ In an action on the bond of a clerk of a United States District Court, it was held that he was not liable for fees received by him for the naturalization of aliens, which had not been included by him in the returns of the "fees and emoluments of his office," required to be made by section 833 of the Revised Statutes; it appearing that it had been the custom in the district for not less than forty-five years for the clerks to charge a fee in naturalization cases, although no fee is provided in the fee bill established by the Act of February 26, 1853;¹⁴² and that it had never been customary to account for such fees; and that defendant's accounts, during his term of office, had been duly certified by the judge, with knowledge of the omission, and audited and adjusted by the proper accounting officers of the government.¹⁴³

"No clerk of a District Court, or clerk of a Circuit Court, shall be allowed by the Attorney-General, except as provided in the next section and in section eight hundred and forty-two, to retain of the fees and emoluments of his office, or, in case both of the said clerkships are held by the same person, of the fees and emoluments of the said offices, respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury, a sum exceeding three thousand five hundred dollars a year for any such district clerk or

¹⁴¹ U. S. R. S. § 833.

¹⁴² U. S. R. S. § 828.

¹⁴³ U. S. v. Hill, 120 U. S. 169; affirming 25 Fed. R. 375.

for any such circuit clerk, or exceeding that rate for any time less than a year.”¹⁴⁴

“The clerks of the several Circuit and District Courts in California, Oregon, and Nevada shall be entitled to charge and receive double the fees hereinbefore allowed to clerks, and shall be allowed, respectively, by the Attorney-General, to retain of the fees so received by them, for their personal compensation, over and above the necessary expenses of their offices, including the salaries of deputy clerks, and necessary clerk hire, to be audited by the proper accounting officers of the Treasury Department, any sum not exceeding seven thousand dollars a year, nor exceeding that rate for any time less than a year: *Provided*, That whenever, in either of the said districts, the same person holds the office of clerk of both the Circuit and District Courts, he shall be allowed by the Attorney-General to retain for his personal compensation, as aforesaid, only such sum as is herein allowed to be retained by a person holding the office of clerk of only one of the said courts.”¹⁴⁵

“Clerks and marshals may be allowed to retain, for all official services in prize causes, an additional compensation not exceeding in amount one half of the maximum compensation allowed to them, respectively, by the three preceding sections.”¹⁴⁶

“The allowances for personal compensation of district attorneys, clerks, and marshals, for each calendar year, shall be made from the fees and emoluments of that year, and not otherwise.”¹⁴⁷

“Every district attorney, clerk, and marshal shall, at the time of making his half-yearly return to the Attorney-General, pay into the Treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney-General, any surplus of the fees and emoluments of his office which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him.”¹⁴⁸

“In every case where the return of a district attorney, clerk, or marshal shows that a surplus may exist, the Attorney-General shall cause such returns to be carefully examined, and the accounts of disbursements to be regularly audited by the proper officer of his Department, and an account to be opened with such officer in proper books to be provided for that purpose.”¹⁴⁹

¹⁴⁴ U. S. R. S. § 839.

¹⁴⁵ U. S. R. S. § 840.

¹⁴⁶ U. S. R. S. § 842.

¹⁴⁷ U. S. R. S. § 843.

¹⁴⁸ U. S. R. S. § 844.

¹⁴⁹ U. S. R. S. § 845.

"The accounts of district attorneys, clerks, marshals, and commissioners of Circuit Courts shall be examined and certified by the District judge of the district for which they are appointed, before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts: *Provided*, That no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs. (That where the ministerial officers of the United States have or shall incur extraordinary expense in executing the laws thereof, the payment of which is not specifically provided for, the President of the United States is authorized to allow the payment thereof under the special taxation of the District or Circuit Court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary.)"¹⁵⁰

"Before any bill of costs shall be taxed by any Judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the Treasury, in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States Circuit or District Court, and, in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law, and just. United States Commissioners shall forward their accounts, duly verified by oath, to the district attorneys for their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid. Accounts and vouchers of clerks, marshals, and district attorneys shall be made in duplicate, to be marked, respec-

¹⁵⁰ U. S. R. S. § 846.

tively, 'original' and 'duplicate.' And it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the Treasury, and to retain in his office the duplicates, where they shall be open to public inspection at all times. Nothing contained in this act shall be deemed in any wise to diminish or affect the right of revision of the accounts to which this act applies by the accounting officers of the Treasury, as exercised under the laws now in force."¹⁵¹ "If any clerk of any District or Circuit Court of the United States shall wilfully refuse or neglect to make any report, certificate, statement, or other document required by law to be by him made, or shall wilfully refuse or neglect to forward any such report, certificate, statement, or document to the department, officer, or person to whom by law the same should be forwarded, the President of the United States is empowered, and it is hereby made his duty, in every such case, to remove such clerk so offending from office, by an order in writing for that purpose. And upon the presentation of such order, or a copy thereof, authenticated by the Attorney-General of the United States, to the judge of the court whereof such offender is clerk, such clerk shall thereupon be deemed to be out of office, and shall not exercise the functions thereof. And such district judge, in the case of the clerk of a District Court, shall appoint a successor; and in the case of the clerk of a Circuit Court, the circuit judge shall appoint a successor. And such person so removed shall not be eligible to any appointment as clerk or deputy clerk for the period of two years next after such removal."¹⁵²

"If any clerk mentioned in the preceding section shall wilfully refuse or neglect to make or to forward any such report, certificate, statement, or document therein mentioned, he shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, in the discretion of the court; but a conviction under this section shall not be necessary as a condition precedent to the removal from office provided for in this act."¹⁵³

¹⁵¹ 1 Supp. U. S. R. S. § 1, pp. 145, 146; 18 St. at L. 333.

¹⁵² 1 Supp. U. S. R. S. § 5, pp. 146, 147; 18 St. at L. 333.

¹⁵³ 1 Supp. U. S. R. S. § 6, p. 147; 18 St. at L. 333.

§ 331 a. **Commissioners' Fees.**—The fees of United States commissioners are fixed by statute as follows: "For administering an oath, ten cents."¹ When a complaint in a criminal prosecution is sworn to and filed, the commissioner is entitled to the fee of ten cents in addition to the fee for filing a paper in a cause.² He may also charge ten cents for administering an oath required by the State law to be administered to sureties on a bail bond.³ A commissioner may charge ten cents for each witness to whom he administers an oath in proof of his mileage and attendance.⁴ A commissioner who acts as Chief Supervisor of Elections may charge for drawing the oaths of the supervisors, for administering them, and for the jurat to each oath;⁵ for drawing the affidavits of each supervisor as to his services for which compensation is claimed;⁶ for copies of the same when required by the Department of Justice;⁷ for administering oaths to voters;⁸ for filing recommendations for appointments of supervisors, but not for recording and indexing the same;⁹ for indexing appointments, but not for recording them;¹⁰ for preparing and printing general and special instructions to supervisors, but not to a charge per folio for each copy furnished to a supervisor.¹¹ Such a commissioner may charge for certificates to the accounts of supervisors and deputy marshals;¹² for stationery and for printing forms and blanks;¹³ but not for a *per diem* fee, or mileage for his attendance in court;¹⁴ nor for notifying supervisors of their appointments.¹⁵

"For taking an acknowledgment, twenty-five cents."¹⁶ A commissioner may charge fifteen cents a folio for drawing a bail bond,¹⁷ and he may charge twenty-five cents for an acknowledgment to a bail bond.¹⁸ He can ordinarily charge but a single fee for taking the acknowledgment of principal and sureties to a bail bond.¹⁹

§ 331 a. ¹ U. S. R. S. § 847.

² U. S. v. McDermott, 140 U. S. 151; U. S. v. Barber, 140 U. S. 164; Strong v. U. S., 34 Fed. R. 17; McKinistry v. U. S., 34 Fed. R. 211. See U. S. v. Ewing, 140 U. S. 142.

³ U. S. v. Barber, 140 U. S. 164; Strong v. U. S., 34 Fed. R. 17; McKinistry v. U. S., 34 Fed. R. 211. See U. S. v. Ewing, 140 U. S. 142.

⁴ U. S. v. Barber, 140 U. S. 164.

⁵ U. S. v. McDermott, 140 U. S. 151.

⁶ U. S. v. McDermott, 140 U. S. 151.

⁷ U. S. v. McDermott, 140 U. S. 151.

⁸ U. S. v. McDermott, 140 U. S. 151.

⁹ U. S. v. Poinier, 140 U. S. 160.

¹⁰ U. S. v. Poinier, 140 U. S. 160.

¹¹ U. S. v. McDermott, 140 U. S. 151; U. S. v. Poinier, 140 U. S. 160.

¹² U. S. v. McDermott, 140 U. S. 151.

¹³ U. S. v. Poinier, 140 U. S. 160.

¹⁴ U. S. v. McDermott, 140 U. S. 151; U. S. v. Poinier, 140 U. S. 160.

¹⁵ U. S. v. McDermott, 140 U. S. 151.

¹⁶ U. S. R. S. § 847.

¹⁷ Marvin v. U. S., 44 Fed. R. 405.

¹⁸ Strong v. U. S., 34 Fed. R. 17.

¹⁹ U. S. v. Ewing, 140 U. S. 142, 146.

"For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed."²⁰ A commissioner has judicial discretion to grant a continuance, and may charge a *per diem* fee for a day on which a continuance is had.²¹ He may charge a *per diem* fee for time spent in hearing and deciding a motion for bail, and the sufficiency of bail.²² A commissioner cannot charge a *per diem* fee of five dollars for merely clerical services. Such services do not involve "a hearing and deciding."²³ A commissioner is entitled to a *per diem* fee for time actually spent by him in his judicial character as commissioner on criminal cases after the accused were arrested, though their cases were continued,²⁴ and the commissioner's *per diem* for services performed as such, though he performed services as clerk, and received compensation therefor on the same day.²⁵ The provision of the Act of August 4, 1886,²⁶ which is an appropriation bill, that commissioners may be paid the same compensation as is allowed clerks for like services, but "shall not be entitled to any docket fees," applies not merely to that appropriation, but is still in force.²⁷

"For attending to a reference in a litigated matter, in a civil cause at law, in equity, or in admiralty, in pursuance of an order of the court, three dollars a day."²⁸ If the commissioners are required by the court to forward to the clerk a transcript of the proceedings in a case examined by them, they are entitled to be paid for a copy of the proceedings as entered on their docket at the rate of ten cents a folio, and for the certificate annexed thereto at the rate of fifteen cents a folio.²⁹

"For taking and certifying depositions to file, twenty cents for each folio."³⁰ Under this clause a fee may be charged for drawing the complaint on a criminal charge,³¹ even if more than three folios in length,³² and although more than one com-

²⁰ U. S. R. S. § 847; U. S. v. Jones, 134 U. S. 483.

²¹ U. S. v. Ewing, 140 U. S. 142, 150.

²² U. S. v. Jones, 134 U. S. 483.

²³ Rand v. U. S., 36 Fed. R. 671; Harper v. U. S., 21 Ct. of Cl. 56.

²⁴ Marvin v. U. S., 44 Fed. R. 405; U. S. v. Jones, 134 U. S. 483; U. S. v. Ewing, 140 U. S. 142.

²⁵ Marvin v. U. S., 44 Fed. R. 405.

²⁶ 24 St. at L. 274.

²⁷ U. S. v. Ewing, 140 U. S. 142, Marvin v. U. S., 44 Fed. R. 405.

²⁸ U. S. R. S. § 847.

²⁹ U. S. R. S. § 847, par. 7, and § 828, par. 8, 9; McKinistry v. U. S., 34 Fed. R. 211; Strong v. U. S., 34 Fed. R. 17.

³⁰ U. S. R. S. § 847.

³¹ U. S. v. Ewing, 140 U. S. 142, 145; U. S. v. McDermott, 140 U. S. 151; U. S. v. Barber, 140 U. S. 164.

³² U. S. v. Barber, 140 U. S. 177, 178.

plaint is made against the same party for a violation of the same statute;³³ and for writing down the testimony of witnesses.³⁴ Any State officer who is authorized to take depositions will usually be allowed the same fees for such services as are allowed to a clerk of a court or a court commissioner, though no Federal statute makes any provision for such fees.³⁵

"For each copy of the same," certified depositions on file, "furnished to a party on request, ten cents for each folio."³⁶

"For issuing any warrant or writ, and for any other service, the same compensation as is allowed to clerks for like services."³⁷

So much of this clause as allows a commissioner a docket fee is held to have been repealed by the Act of August 4, 1886, where a proviso expressly declared that commissioners shall not be entitled to any docket fees.³⁸ The provision that for any other service such compensation shall be given as is allowed to clerks for like services, entitles a commissioner to a docket fee only when he actually performs such services as he is required to perform by law or by an order of the court.³⁹ "Like services" do not necessarily mean the same services, but similar services.⁴⁰ A commissioner is entitled to a fee for issuing a warrant and subpœna and filing the same when returned,⁴¹ and for entering the return.⁴² A commissioner may charge ten cents for filing a complaint.⁴³ He is entitled to a charge per folio for jury rolls of witnesses;⁴⁴ to a charge per folio for the transcripts of his proceedings returned to the clerk's office;⁴⁵ to a separate charge for the oath of each surety to a bail bond or recognizance, and for the jurat to such oaths; and to a single charge for the acknowledgment of the execution of a bail bond or recognizance by the principal and all the sureties.⁴⁶ Each deposition is not a separate paper, for filing which a fee of ten cents may be charged.⁴⁷ When several depo-

³³ *U. S. v. Barber*, 140 U. S. 177, 179.

³⁴ *U. S. v. Ewing*, 140 U. S. 142, 147; *U. S. v. Barber*, 140 U. S. 164.

³⁵ *Jerman v. Stewart*, 12 Fed. R. 271.

³⁶ U. S. R. S. § 847.

³⁷ U. S. R. S. §§ 828, 847; *U. S. v. Wallace*, 116 U. S. 398.

³⁸ 24 Stat. pp. 256, 274; *U. S. v. Ewing*, 140 U. S. 142.

³⁹ *Strong v. U. S.*, 34 Fed. R. 17; *Mc-*

Kinistry v. U. S., 34 Fed. R. 211; *U. S. v. Ewing*, 140 U. S. 142.

⁴⁰ *U. S. v. Knox*, 128 U. S. 230, 233; *U. S. v. Wallace*, 116 U. S. 398.

⁴¹ *Strong v. U. S.*, 34 Fed. R. 17; *McKinistry v. U. S.*, 34 Fed. R. 211.

⁴² *U. S. v. Ewing*, 140 U. S. 142.

⁴³ *U. S. v. Barber*, 140 U. S. 164, 166.

⁴⁴ *U. S. v. Barber*, 140 U. S. 164, 167.

⁴⁵ *U. S. v. Barber*, 140 U. S. 164, 167.

⁴⁶ *U. S. v. Barber*, 140 U. S. 164, 167.

⁴⁷ *U. S. v. Barber*, 140 U. S. 164, 168.

sitions are attached together, they are considered as the same paper.⁴⁸ A commissioner may charge fifteen cents a folio for drawing a bail-bond.⁴⁹ Where a commissioner is ordered by the court to make a monthly report in duplicate of all cases instituted or examined before him, he may charge for furnishing the same at the rate of fifteen cents a folio.⁵⁰ In the District of Tennessee a warrant or other writ requires a seal, and a commissioner may tax a fee of twenty cents for affixing his seal thereto.⁵¹ A commissioner is entitled to ten cents a folio for copies of the "process" returned by him into the clerk's office of the court, as required by Section 1014 of the Revised Statutes. By copies of process is meant the warrant or writ by which the defendant is brought to answer the charge preferred against him.⁵² The provision of Section 1030 of the Revised Statutes, that no writ is necessary for remanding a prisoner from the court into custody applies where the accused is in custody under a warrant from the court, and not where he is arrested on the first warrant of the commissioner to arrest and bring before him, and, at least in the District of Tennessee, the commissioner is entitled to a fee for a *mittimus* upon the first continuance, if the prisoner is to be held.⁵³ The commissioner is entitled to fees for the affidavit, warrant, &c., in the case of an accused person who was not arrested, because he left the State.⁵⁴ Under the provision of the statute that "copies of the process shall be returned to the clerk's office," fees should be allowed for transcripts of the record.⁵⁵

"For issuing any warrant under the tenth article of the treaty of August nine, one thousand eight hundred and forty-two, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any crime or offence set forth in said article, two dollars."⁵⁶

"For issuing any warrant under the provision of the convention for the surrender of criminals, between the United States and the King of the French, concluded at Washington. No-

⁴⁸ U. S. v Barber, 140 U. S. 164, 168; Schell's Ex'rs v. Touché, 138 U. S. 562.

⁴⁹ U. S. R. S. §§ 828, 847; Strong v. U. S., 34 Fed. R. 17; McKinistry v. U. S., 34 Fed. R. 211.

⁵⁰ U. S. R. S. §§ 828, 847; Strong v. U. S., 34 Fed. R. 17; McKinistry v. U. S., 34 Fed. R. 211.

⁵¹ Clough v. U. S., 47 Fed. R. 791.

⁵² U. S. R. S. §§ 828, 847, 1014; McKinistry v. U. S., 34 Fed. R. 211; Strong v. U. S., 34 Fed. R. 17; U. S. v. Ewing, 140 U. S. 142.

⁵³ U. S. v. Ewing, 140 U. S. 112; Marvin v. U. S., 44 Fed. R. 405.

⁵⁴ Marvin v. U. S., 44 Fed. R. 405.

⁵⁵ Marvin v. U. S., 44 Fed. R. 405.

⁵⁶ U. S. R. S. § 847.

vember nine, one thousand eight hundred and forty three, two dollars." ⁵⁷

"For hearing and deciding upon the case of any person charged with any crime or offence, and arrested under the provisions of said treaty, or of said convention, five dollars a day for the time necessarily employed." ⁵⁸ A commissioner cannot charge a fee for drawing criminal complaints, ⁵⁹ but he may for filing them. ⁶⁰

"For the examination and certificate in cases of applications for discharge of poor convicts, imprisoned for non-payment of a fine, or fine and costs, five dollars a day for the time necessarily employed." ⁶¹

A commissioner is entitled to fifteen cents a folio for every order or certificate given by him to a witness or officer, and on which the witness or officer is paid. ⁶²

It has been held that under the Chinese Exclusion Act ⁶³ a commissioner can charge a docket fee of twenty dollars, but no fee for any other services. ⁶⁴

332. Marshal's Fees.¹ — "The marshal of the Supreme Court of the United States shall be entitled to receive for the service of any warrant, attachment, summons, *capias*, or other writ, except execution, *venire*, or a summons, or *subpoena* for a witness, one dollar for each person on whom such service may be made. His fees for all other services shall be the same as are herein allowed to other marshals; but he shall pay into the Treasury of the United States all fees received by him, and render a true account thereof at the close of each term to the Attorney-General." ² The fees of the other United States marshals are fixed by statute as follows:

"For service of any warrant, attachment, summons, *capias*, or other writ, except execution, *venire*, or a summons or *subpoena* for a witness, two dollars for each person on whom service is made." ³ The marshal has a right to demand in advance the payment of fees for the service of process, ⁴ and may have an attachment to

⁵⁷ U. S. R. S. § 847.

⁵⁸ U. S. R. S. § 847.

⁵⁹ *Strong v. U. S.*, 34 Fed. R. 17.

⁶⁰ *McKinstry v. U. S.*, 34 Fed. R. 211.

⁶¹ U. S. R. S. § 847. See also § 1042.

⁶² *Strong v. U. S.*, 34 Fed. R. 17; *McKinstry v. U. S.*, 34 Fed. R. 211; *U. S. v. Ewing*, 140 U. S. 142; *U. S. v. McDermott*, 140 U. S. 151; *U. S. v. Barber*, 140 U. S. 164.

⁶³ 23 St. at L. 115, 117, 118.

⁶⁴ *Carr v. U. S.* 23 Ct. of Cl. 118.

§ 332. ¹ By T. M. Rowlette, Esq., of the New York bar, and S. Lewis Moody, Esq., of the Maine bar.

² U. S. R. S. § 832.

³ U. S. R. S. § 829.

⁴ *Ray v. Knowlton*, 11 Biss. C. C. 360; *Duy v. Knowlton*, 14 Fed. R. 107.

enforce payment against suitors in the court,⁵ or against an indorser on the writ who, by local law, is liable to respond for the costs.⁶ Where the marshal by mistake arrests the wrong person, or arrests the right person, but beyond his jurisdiction, he cannot be allowed fees of any kind.⁷ The marshal is not entitled to a fee for arrest, when he allows the prisoner to go free on his promise to attend court; nor when the arrest is not authorized by warrant.⁸ Charges for "aid" or assistance are allowed where the nature of the case renders it proper, and the amount claimed is shown to be reasonable.⁹ When writs issued before the marshal who served them qualified for office are turned over to him by his predecessor under arrangement that he should have the fees therefor, and the writs are served by him after he qualifies, he is entitled to fees for such service.¹⁰ The marshal is not entitled to fees for the custody and guard of prisoners under bail. The sureties on the bond are a sufficient guard.¹¹ An appearance bond is evidence to commissioners of a due arrest.¹² By Act of March 3, 1887, it was provided, "That hereafter no part of the appropriations made for the payment of fees for United States marshals or clerks shall be used to pay the fees of United States marshals or clerks upon any writ or bench warrant for the arrest of any person or persons who may be indicted by any United States grand jury, or against whom an information may be filed, where such person or persons is or are under a recognizance taken by or before any United States commissioner or other officer authorized by law to take such recognizance, requiring the appearance of such person or persons before the court in which such indictment is found or information is filed, and when such recognizance has not been forfeited or said defendant is not in default, unless the court in which such indictment or information is pending orders a warrant to issue; nor shall any part of any money appropriated be used in payment of a *per diem* compensation to any attorney, clerk, or marshal for attendance in court, except for days when the court is open by the judge for business or business is actually transacted in court, and when they attend

⁵ Anonymous, 2 Gall. 101.

⁶ Anonymous, 2 Gall. 101.

⁷ Matter of Crittenden, 2 Flippin, 212.

⁸ U. S. v. Ebbs, 10 Fed. R. 369; s. c. 4 Hughes, 473.

⁹ *Ex parte* Paris, 3 W. & M. 227.

¹⁰ Fletcher v. U. S., 45 Fed. R. 213.

¹¹ U. S. v. Ebbs, 10 Fed. R. 369; s. c.

4 Hughes, 473.

¹² U. S. v. Ebbs, 10 Fed. R. 369; s. c.

4 Hughes, 473.

under Sections five hundred and eighty-three, five hundred and eighty-four, six hundred and seventy-one, six hundred and seventy-two, and two thousand and thirteen, of the Revised Statutes, which fact shall be certified in the approval of their accounts.”¹³

“For the keeping of personal property attached on mesne process, such compensation as the court, on petition setting forth the facts under oath, may allow.”¹⁴ The marshal’s fees for the custody of goods in cases of seizure, and other proceedings *in rem*, are not discretionary, but are dependent upon the precise regulations of law, or, in the absence of such regulations, are to be allowed upon the principle of a *quantum meruit*, graduated by the ordinary value of similar services, and dependent upon the circumstances of each particular case. Where such fees are not regulated by law, an auditor should pass upon them.¹⁵ The marshal is entitled to be paid his fees at the time he delivers up the property to the person entitled to receive it.¹⁶ The court will not allow pay for extra men employed by the marshal to prevent the collector of customs from taking by force property from his custody.¹⁷

“For serving venires and summoning every twelve men as grand or petit jurors, four dollars, or thirty-three and one-third cents each. In States where, by the laws thereof, jurors are drawn by lot, by constables, or other officers of corporate places, the marshal shall receive, for each jury, two dollars for the use of the officers employed in drawing and summoning the jurors and returning each venire, and two dollars for his own services in distributing the venires. But the fees for distributing and serving venires, drawing and summoning jurors by township officers, including the mileage chargeable by the marshal for each service, shall not at any court exceed fifty dollars.”¹⁸ Where the jurors are drawn by State officers, the marshal is still entitled to his fees for serving the venires on such officers;¹⁹ where the venires are served by a State officer, the marshal is not entitled to a travelling fee.²⁰

“For holding a court of inquiry or other proceedings before a jury, including the summoning of a jury, five dollars.”²¹

¹³ 24 St. at L. c. 362, p. 541.

¹⁴ U. S. R. S. § 829.

¹⁵ *Bottomley v. U. S.*, 1 Story (Mass.), 135, 153.

¹⁶ *The Georgeanna*, 31 Fed. R. 405.

¹⁷ *The Perseverance*, 22 Fed. R. 462.

¹⁸ U. S. R. S. § 829.

¹⁹ *U. S. v. Cogswell*, 3 Sumner, 204.

U. S. v. Smith, 1 W. & M. 184.

²⁰ *U. S. v. Smith*, 1 W. & M. 184.

²¹ U. S. R. S. § 829.

"For serving a writ of subpoena on a witness, fifty cents; and no further compensation shall be allowed for any copy, summons, or notice for a witness."²²

The marshal cannot charge mileage for the service of a writ of subpoena issued, at the same time and in the same cause, upon witnesses residing in the same locality with one for whom a writ of arrest is issued in a criminal cause. The service of such subpoena does not require another "actual and necessary" travel.²³

"For serving a writ of possession, partition, execution, or any final process, the same mileage as is allowed for the service of any other writ; and for making the service, seizing or levying on property, advertising and disposing of the same by sale, set-off, or otherwise according to law, receiving and paying over the money, the same fees and poundage as are or shall be allowed for similar services to the sheriffs of the States, respectively, in which the service is rendered."²⁴ Where a marshal who levied the execution has received his half commissions, his successor will be entitled to no more than his half commissions for completing and paying it over.²⁵ The marshal is not entitled to fees where no property is sold nor any money received under an execution.²⁶ Otherwise where money is paid, though no sale is necessary.²⁷ The marshal cannot charge interest on his fees, although he may on his disbursements.²⁸

If the State court compensates services similar to those performed by a marshal, although not performed there by a like officer, the marshal is entitled to the same compensation.²⁹ When an execution against the person was issued in the county of New York, the defendant held under arrest for some time, and the action subsequently settled by a compromise, the defendants paying a smaller sum than that specified in the execution, it was held that the marshal was entitled to poundage on the whole amount for which the execution issued; and that the rate of poundage should be that allowed the sheriffs in the different counties

²² U. S. R. S. § 829.

²³ U. S. v. Ralston, 17 Fed. R. 895; 15 Atty.-Gen. Opinions, 108. But see 3 Atty.-Gen. Opinions, 496; Harmon v. U. S., 43 Fed. R. 560; Fletcher v. U. S., 45 Fed. R. 213.

²⁴ U. S. R. S. § 829; Pomeroy v. Harter, 1 McLean (Ind.), 448.

²⁵ 15 Op. Atty.-Gen. 346.

²⁶ Irwin v. Cummins, Hempst. 703.

²⁷ Pomeroy v. Harter, 1 McLean (Ind.), 448.

²⁸ Re Donahue, 8 Bankr. Reg. 453.

²⁹ Pomeroy v. Harter, 1 McLean (Ind.), 448; The Trial, 1 Blatchf. & H. 94.

throughout the State, and not the special rate allowed in the county of New York.³⁰ When the marshal extends an execution on real estate for the government he is entitled to his fees for the same, though the land is not yet sold or redeemed, nor in any way converted into money.³¹ The fees for services of a deputy marshal belong legally to the marshal, and he controls them, and his receipt must operate as a discharge of the fees.³² No fee is allowed for service of a writ or warrant unless actually executed.³³ Mileage is to be computed from the place where the process is returned to the place of service. The "place of return" is the place where the process is issued.³⁴ The marshal may charge poundage on the debt, if authorized by State laws, where an insolvent is discharged from imprisonment by the Secretary of the Treasury on payment of costs.³⁵ The marshal's duty to serve, and right to compensation for the service of precepts, which are agreed to have been duly issued by the court or a commissioner in accordance with established usage, cannot be affected by the opinion of the comptroller that the issue of such precepts was unnecessary.³⁶

"For each bail-bond, fifty cents."³⁷

"For summoning appraisers, fifty cents each."³⁸

"For executing a deed by a party or his attorney, one dollar."³⁹

"For drawing and executing a deed, five dollars."⁴⁰ The marshal cannot object to the purchaser drawing his own deed if he choose.⁴¹

"For copies of writs or papers furnished at the request of any party, ten cents a folio."⁴² When the marshal has, with the proper sanction of the Attorney-General, provided blank indictments and informations for the necessary use of the district attorney, he is entitled to be reimbursed for such expenditures.⁴³

"For every proclamation in admiralty, thirty cents."⁴⁴

"For serving an attachment *in rem* or a libel in admiralty, two

³⁰ U. S. v. Haas, 5 Fed. R. 29.

³¹ U. S. v. Smith, 44 Fed. R. 405.

³² Wintermute v. Smith, 1 Bond, 210.

³³ *Ex parte* Paris, 3 W. & M. 227.

³⁴ Matter of Crittenden, 2 Flippin, 212.

³⁵ Townsend v. U. S., 1 U. S. L. J. 534 b; and for cases in which the marshal is entitled to poundage, see U. S. v. Ringgold, 8 Pet. 150; Causin v. Chubb, 1 Cranch C. C. 267; Ringgold v. Glover, 2 Cranch C. C. 427; U. S. v. Smith, 3 Cranch C. C. 66; Mason v. Muncaster,

3 Cranch C. C. 403; Ringgold v. Lewis,

3 Cranch C. C. 367; Swann v. Ringgold,

4 Cranch C. C. 238.

³⁶ Harmon v. U. S., 43 Fed. R. 560.

³⁷ U. S. R. S. § 829.

³⁸ U. S. R. S. § 829.

³⁹ U. S. R. S. § 829.

⁴⁰ U. S. R. S. § 829.

⁴¹ The John E. Mulford, 18 Fed. R. 455.

⁴² U. S. R. S. § 829.

⁴³ Harmon v. U. S., 43 Fed. R. 560, 565.

⁴⁴ U. S. R. S. § 829.

dollars.”⁴⁵ Where process *in rem* is issued against a vessel, but before process is served the claimant, waiving service, gives a bond under section 941 of the Revised Statutes, and the case proceeds to final decree, no actual seizure having been made by the marshal, he is still entitled to his fees on the settlement of the case.⁴⁶ It is not necessary that there should be a sale in order to entitle him to his fees.⁴⁷

“For the necessary expenses of keeping boats, vessels, or other property attached or libelled in admiralty, not exceeding two dollars and fifty cents a day.”⁴⁸ On delivering up the property the marshal may demand his fees of the person entitled to recover it.⁴⁹ He must take actual possession of the vessel, or he is not entitled to fees.⁵⁰ He may take such possession as to render him liable to the parties, and yet not be entitled to fees.⁵¹ The marshal's actual expenses for ship-keeping must, by vouchers, etc., be established to be necessary to the satisfaction of the court.⁵² And the approval by the district attorney of the employment of extra keepers will not be sufficient to establish the right of the marshal to an allowance for the employment of such extra keepers.⁵³ Notwithstanding the limit named in this clause, the marshal will be allowed the extra cost of dockage of a vessel seized while on a marine railway from which she could not be removed without danger of sinking.⁵⁴ The libellant must get an order from the court directing the withdrawal of the keeper, if he would not be liable for keeper's fees should he lose the suit. Mere notice to the marshal is not enough.⁵⁵ If the parties agree that the vessel should be four months in the marshal's charge, the sum actually paid a watchman by him is taxable as part of the costs, even though the claimant also had a keeper on the vessel.⁵⁶ Entry by the marshal into the bonded warehouse where the goods are stored, and levying of process against and affixing a notice of seizure upon such property, is an attachment upon the property within the meaning of the statute, and the custody fees of a keeper who visited the storehouse three times a day, though he

⁴⁵ U. S. R. S. § 829.

⁴⁶ The City of Washington, 13 Blatchf. 410.

⁴⁷ The Captain John, 41 Fed. R. 147.

⁴⁸ U. S. R. S. § 829.

⁴⁹ The Georgeanna, 31 Fed. R. 405.

⁵⁰ The Hibernia, 1 Sprague, 78.

⁵¹ The Hibernia, 1 Sprague, 78.

⁵² The Free Trader, 1 Brown Adm. 72.

⁵³ The Captain John, 41 Fed. R. 147, 149; The Perseverance, 22 Fed. R. 462.

⁵⁴ The Novelty, 9 Ben. 195.

⁵⁵ The Independent, 9 Ben. 489.

⁵⁶ The San Jacinto, 30 Fed. R. 266.

did not enter, are taxable as costs.⁵⁷ The court will not allow pay for extra men employed by the marshal to prevent the collector of customs from taking by force property from his custody.⁵⁸ Nor will the court allow the marshal five dollars a day on the ground that two men were employed to watch,—one by day and one by night.⁵⁹ But two dollars and fifty cents a day is not the absolute limit, and more will be allowed in the case of danger from thieves, and in other emergencies requiring more than one man to guard the property, since the marshal is bound to protect from damage a vessel in his custody.⁶⁰ But when a marshal has done work in a defective manner, and additional labor becomes necessary in consequence, no compensation for the latter should be allowed.⁶¹ A marshal, being the party served, is not entitled to fees for serving a warrant for the delivery of a vessel to the claimant issued upon a stipulation of the parties; but he is entitled to be reimbursed for any expenses he is put to on account of having been served with such warrant.⁶² The cost of pumping out a vessel in charge of the marshal is properly allowed against the claimants in admiralty.⁶³ If, in the estimation of the court, it was, under the circumstances, prudent for the marshal to remove and insure property in his possession, he will be allowed the expenses necessarily incurred thereby.⁶⁴ And he should insure it with reference to its actual market value, irrespective of its original cost.⁶⁵ The marshal is also entitled to be reimbursed for his expenses in hiring wharfage for a vessel in his custody, when such a course appears to have been necessary.⁶⁶ If several processes are issued against one vessel, and the marshal has possession under all the processes, the *per diem* custody fees should be apportioned equally among the claimants, saving to the marshal, in case any party fails to pay his proper proportion, a remedy against the other parties for the amount.⁶⁷

“When the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a

⁵⁷ *Jorgensen v. Casks of Cement*, 40 Fed. R. 606.

⁵⁸ *The Perseverance*, 22 Fed. R. 462.

⁵⁹ *The Perseverance*, 22 Fed. R. 462.

⁶⁰ *The Perseverance*, 22 Fed. R. 462.

⁶¹ *The Nellie Peck*, 25 Fed. R. 463.

⁶² *The Jeanie Landles*, 17 Fed. R. 91.

⁶³ *The Captain John*, 41 Fed. Reporter 147.

⁶⁴ *U. S. v. Three Hundred Barrels of Alcohol*, 1 Ben. 72.

⁶⁵ *U. S. v. Three Hundred Barrels of Alcohol*, 1 Ben. 72.

⁶⁶ *The Novelty (Steamboat)*, 9 Ben. 195. But see *The F. Merwin*, 10 Ben. 403.

⁶⁷ *The Circassian*, 6 Ben. 512; *The John Walls, Jr.*, 1 Sprague, 178.

commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars: *Provided*, that, when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof."⁶⁸ The word "claim" as here used applies equally to "a claim of forfeiture to the United States, in a proceeding *in rem* against a vessel," as well as to cases where the demand or claim is personal in its nature.⁶⁹ The sum paid a libellant in settlement of his claim, and not the amount claimed in the libel, is the basis upon which the marshal's commissions are to be determined.⁷⁰ The issuing of a process and the giving of a bond under section 941 of the Revised Statutes to the marshal will entitle him to his commissions in a suit *in rem* against a vessel under this clause, although the service of the process be waived and seizure of the vessel be not actually made. If the amount of the final decree is paid before execution, that is such a settlement of the claim as will entitle the marshal to his commissions.⁷¹ So if part of the goods are sold or there is a part-payment in settlement, the marshal will be entitled to his commissions *pro rata*.⁷² Where a vessel is sold by a trustee under the limited liability act, the marshal is not entitled to a commission.⁷³

"For sale of vessels or other property under process in admiralty or under the order of a court of admiralty, and for receiving and paying over the money, two and one-half per centum on any sum under five hundred dollars, and one and one-quarter per centum on the excess of any sum over five hundred dollars."⁷⁴ The marshal is not authorized by law to employ an auctioneer to make sales under process or decree in admiralty; and if he employs one, he can make no charge for the services of such auctioneer which he could not otherwise have charged. Nor can he make such charge by a notice prior to the sale, that an auctioneer's fee will be required of the purchaser in addition to his bid.⁷⁵ Where a mar-

⁶⁸ U. S. R. S. § 829.

⁶⁹ The Captain John, 41 Fed. R. 147, 151.

⁷⁰ Robinson v. Bags of Sugar, 35 Fed. R. 603; The Clintonia, 11 Fed. R. 740.

⁷¹ The City of Washington, 13 Blatchf. 410. Compare Bone v. The Norma, Newb. Adm. 533; and see The Clintonia, 11 Fed. R. 740, citing The Russia, 5 Ben. 84;

Robinson v. Bags of Sugar, 35 Fed. R. 603.

⁷² Swann v. Ringgold, Cranch C. C. 246.

⁷³ The Vernon, 36 Fed. R. 113.

⁷⁴ U. S. R. S. § 829.

⁷⁵ The John C. Mulford, 18 Fed. R. 455; Crofut v. Brandt, 13 Abb. Pr. (N. S.) 132.

shal has been paid his fees and commissions on the sale of a vessel under decree, and a claimant files a petition on which monition is issued, asking that the balance of the proceeds be paid to him, and the court so orders, the marshal cannot claim an additional commission on the amount paid by the claimant.⁷⁶ Upon an interlocutory sale of prize property, the marshal is entitled to full commissions.⁷⁷ So if the property is removed to and sold in another district.⁷⁸ The marshal's title to commissions accrues at the time of the sale, and he is entitled to deduct his fees at the time when he pays the proceeds into court.⁷⁹ If, by agreement of parties, the vessel is sold outside of the territorial limits of the marshal's authority, he is, nevertheless, entitled to his fees.⁸⁰

"For disbursing money to jurors and witnesses, and for other expenses, two per centum."⁸¹ The comptroller may not object to the recovery of witness fees disbursed by the marshal in accordance with a court order.⁸²

"For expenses while employed in endeavoring to arrest, under process, any person charged with or convicted of a crime, the sum actually expended, not to exceed two dollars a day, in addition to his compensation for service and travel."⁸³ Part of the expense in serving a writ in a criminal case is the *per diem* paid the marshal's deputy.⁸⁴ Where a marshal, acting as the deputy of the marshal of another district, arrests criminals in that district, and such marshal relinquishes to him all claim for fees for such arrest, the marshal is entitled to compensation for his services in pursuing, arresting, and bringing back such fugitives from justice.⁸⁵ The marshal is entitled, as expenses, to a *per diem* paid his deputy, not to exceed two dollars a day.⁸⁶

"For every commitment or discharge of a prisoner, fifty cents."⁸⁷ A fee may be properly allowed the marshal when the prisoner is released entirely from custody, but not when brought into court for trial or testifying.⁸⁸ No fee should be allowed the marshal for a commitment made in any other case than under an order of the court or in the execution of a *mittimus*.⁸⁹

⁷⁶ The Colorado, 21 Fed. R. 592.

⁷⁷ The Avery, 2 Gall. 308.

⁷⁸ The San Jose Indiano, 2 Gall. 311.

⁷⁹ The Avery, 2 Gall. 308.

⁸⁰ The San Jose Indiano, 2 Gall. 311.

⁸¹ U. S. R. S. § 829.

⁸² Harmon v. U. S., 43 Fed. R. 560, 567.

⁸³ U. S. R. S. § 829.

⁸⁴ U. S. v. Harker, 3 Sawyer, 237.

⁸⁵ Fletcher v. U. S., 45 Fed. R. 213.

⁸⁶ U. S. v. Harker, 3 Sawyer, 237.

⁸⁷ U. S. R. S. § 829.

⁸⁸ *Ex parte* Paris, 3 W. & M. 227.

⁸⁹ *Ex parte* Paris, 3 W. & M. 227.

"For transporting criminals, ten cents a mile for himself, and for each prisoner and necessary guard; except in the case provided in the next paragraph."⁹⁰ Expenses for transporting guards for prisoners will be allowed though they were also summoned as witnesses and paid mileage.⁹¹ If expense of a guard is charged, it must be shown to be necessary.⁹²

"For transporting criminals convicted of a crime in any district or Territory where there is no penitentiary available for the confinement of convicts of the United States, to a prison in another district or Territory designated by the Attorney-General, the reasonable actual expense of transportation of the criminals, the marshal, and the guards, and the necessary subsistence and hire."⁹³ The Attorney-General has held that the Act of June 16, 1874, chapter 285, Section 1 (18 Stat. at Large, 72), supercedes the provision of this clause allowing mileage to marshals, and that the expense of guards employed by the marshal for transporting the prisoners are a part of the actual expenses of the marshal.⁹⁴

"For attending the Circuit and District Courts, when both are in session, or either of them when only one is in session, and for bringing in and committing prisoners and witnesses during the term, five dollars a day."⁹⁵ The fact that the fifth day of July was generally celebrated as Independence Day, the fourth falling on Sunday, did not deprive a marshal of his *per diem* fee for attending court on that day, where the record showed that the court was open and transacted business on that day.⁹⁶ The marshal may not charge a *per diem* allowance for days occurring between sessions though within the term.⁹⁷ The hire of hacks to transport prisoners to and from the court, when shown to be in accordance with the usual practice, will be allowed.⁹⁸ Compensation will not be allowed to a marshal for the inspection or keeping of state jails, unless he acts under the direction of a United States court for the purpose of determining their fitness for holding United States prisoners.⁹⁹

⁹⁰ U. S. R. S. § 829.

⁹¹ Matter of Crittenden, 2 Flippin, 212.

⁹² Matter of Crittenden, 2 Flippin, 212.

⁹³ U. S. R. S. § 829.

⁹⁴ 14 Op. Atty.-Gen. 681.

⁹⁵ U. S. R. S. § 829. See 24 St. at L.

509, cited *supra*, § 330, note 87, and § 333, note 123.

⁹⁶ Fletcher v. U. S., 45 Fed. R. 213.

⁹⁷ McMullen v. U. S., 24 Ct. of Cl. 394.

⁹⁸ Harmon v. U. S., 43 Fed. R. 500.

⁹⁹ U. S. R. S. § 830; U. S. v. Smith, 1 W. & M. 184.

“For attending examinations before a commissioner, and bringing in, guarding, and returning prisoners charged with crime, and witnesses, two dollars a day, and for each deputy, not exceeding two, necessarily attending, two dollars a day.”¹⁰⁰ When the commissioner hears the case of a prisoner, and decides that he must give bail for his appearance in court to answer an indictment, and commits him to the custody of the marshal or his deputy, if either happens to be present, until the required bail is given, the marshal is entitled to a fee for attendance at the court and for the service of a guard, if such service is rendered and was necessary; and the marshal, not the commissioner, is the judge of such necessity.¹⁰¹ The number of officers necessary to preserve order, not exceeding the marshal and two deputies, is a matter to be decided by the commissioner in the honest exercise of his discretion.¹⁰² Neither the marshal nor his deputy is entitled to a *per diem* fee for attendance before a commissioner on days for which he has received a *per diem* allowance for attendance before the court.¹⁰³

“For travelling from his residence to the place of holding court to attend a term thereof, ten cents a mile, for going only.”¹⁰⁴ The mileage allowance here granted applies to every trip the marshal takes from his residence to the court, and he is not restricted to one such trip for each term; but where the court adjourns over for one or more days, he may return home, and charge travel for going to attend the term at the days to which it is adjourned. He may also charge travel for going to each special term.¹⁰⁵

“For travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases, six cents a mile, to be computed from the place where the process is returned to the place of service, or when more than one person is served therewith, to the place of service which is most remote, adding thereto the extra travel which is necessary to serve it on the others. But when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause

¹⁰⁰ U. S. R. S. § 829.

¹⁰¹ U. S. v. Ebbs, 10 Fed. R. 369.

¹⁰² Harmon v. U. S., 43 Fed. R. 560.

¹⁰³ Fletcher v. U. S., 45 Fed. R. 213.

¹⁰⁴ U. S. R. S. § 829.

¹⁰⁵ Harmon v. U. S., 43 Fed. R. 560.

in such subpoena as convenience in serving the same will permit.”¹⁰⁶ The clause of the fee-bill allowing for travel in going only, as a compensation for actual travel in going and returning, being independent of the clause allowing fees for transportation of officer and prisoner only while the officer has the prisoner in custody, he is entitled both to transportation for himself and prisoner, and to travel in going to serve a warrant of removal or warrant to commit.¹⁰⁷ Notwithstanding the Acts of 1853 and 1875, Section 829 of the Revised Statutes will be adhered to as the true rule for computation of mileage.¹⁰⁸ By the Act of June 16, 1874,¹⁰⁹ it was provided “that only actual travelling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileage and transportation in excess of the amount actually paid are hereby declared illegal; and no credit shall be allowed to any of the disbursing officers of the United States for payment or allowances in violation of this provision.” The Act of Congress of February 22, 1875, ch. 95, § 7, after making certain provisions for the allowance of the accounts of attorneys, marshals, and clerks, further provides that “no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under provisions of existing law.”¹¹⁰ It was held that the act did not preclude a marshal from full mileage on each of two or more writs served at the same time and place on different persons, but applied only to cases in which there was no actual travel, as where a writ was sent through the mail to be served by a deputy near the place of service.¹¹¹ In one case it was held that the marshal was entitled to but one mileage fee for serving several writs in the same locality, though they were for different purposes.¹¹² But the later decisions seem to hold differently.¹¹³ The marshal is entitled to mileage for actual travel in enabling him to make a return of *nulla bona*.¹¹⁴ He is not entitled to constructive mileage, and his actual travelling expenses must be divided among the causes in his hands to serve at the same

¹⁰⁶ U. S. R. S. § 829

¹⁰⁷ *Harmon v. U. S.*, 43 Fed. R. 560.

¹⁰⁸ *Matter of Crittenden*, 2 Flippin, 212.

¹⁰⁹ 18 St. at L. 72 (1 Suppl. U. S. R. S. 37).

¹¹⁰ 18 St. at L. 333.

¹¹¹ *Harmon v. United States*, 43 Fed. R.

560; *Fletcher v. United States*, 45 Fed. R. 213.

¹¹² *U. S. v. Rolston*, 17 Fed. R. 895.

¹¹³ *Harmon v. U. S.*, 43 Fed. R. 560; *Fletcher v. U. S.*, 45 Fed. R. 213

¹¹⁴ *Anon.*, *Hempst.* 450.

time.¹¹⁵ Should the marshal arrest the wrong person, he is not entitled to fees of any kind; nor will he be allowed additional mileage for transporting a prisoner to a particular place by any other than the usual route of travel to that place.¹¹⁶ He may charge actual expenses for serving a monition, instead of the statutory mileage.¹¹⁷

"In all cases where mileage is allowed to the marshal he may elect to receive the same or his actual travelling expenses, to be proved on his oath to the satisfaction of the court."¹¹⁸ Under Section 5438 of the Revised Statutes a deputy is liable to punishment for presenting a false claim for fees to the marshal,¹¹⁹ or false vouchers, false affidavits, or other false proof as to the number of miles travelled.¹²⁰ Generally the marshal should not be allowed any charges that are not expressly granted by statute.¹²¹ The marshal cannot claim compensation for establishing and settling his claims against the government.¹²² But when in an admiralty proceeding a reference is ordered to determine the amount of a marshal's fees, the expense must be borne by the claimant, even, it has been held, though the referee awards a sum less than the marshal's claim, and one which the claimant was at all times willing to pay.¹²³ The Attorney-General is authorized to exercise general supervision over the accounts of marshals as well as other officers of the United States courts.¹²⁴ A deputy marshal is entitled to full compensation for eleven days' attendance at the polls, notwithstanding a notice from the Attorney-General to such deputy before his appointment as supervisor of the election, that he would be paid for the number of days he should serve, not exceeding five days.¹²⁵ The Attorney-General's regulations as to the length of service and compensation of special deputy marshals cannot invalidate a claim for services as such rendered before those regulations were in existence.¹²⁶ A deputy marshal has no claim against the United States for services

¹¹⁵ *Re Donahue*, 8 Bankr. Reg. 453.

¹¹⁶ *Matter of Crittenden*, 2 Flippin, 212.

¹¹⁷ *The Wavelet*, 25 Fed. R. 733.

¹¹⁸ U. S. R. S. § 829.

¹¹⁹ U. S. v. Strobach, 4 Woods, 592.

¹²⁰ U. S. v. Wallace, 40 Fed. R. 144.

¹²¹ *The John E. Mulford*, 18 Fed. R. 455; *Croft v. Brandt*, 13 Abb. Pr. (N. S.)

132; *Bottomley v. U. S.*, 1 Story, 153; 9 Op. Atty.-Gen. 98.

¹²² U. S. v. Smith, 1 W. & M. 184; U. S. v. Cogswell, 3 Sumner, 204.

¹²³ *The Captain John*, 41 Fed. R. 147.

¹²⁴ U. S. R. S. § 368; U. S. v. Waters, 133 U. S. 208, 214.

¹²⁵ *Stockdale v. U. S.*, 39 Fed. R. 62.

¹²⁶ U. S. v. Davis, 132 U. S. 334; s. c. 10 Sup. Ct. R. 105; U. S. v. Schofield, 132 U. S. 337; s. c. 10 Sup. Ct. R. 106.

rendered as deputy marshal, but only against the marshal.¹²⁷ If the marshal cannot obtain his disbursements for taking the census from the proper department, though he makes repeated applications, he may retain the amount out of the public moneys in his hands.¹²⁸ The marshal must pay to his deputies and assistants employed in taking the census the same funds, or their equivalent, which he has received from the government.¹²⁹

“There shall be paid to the marshal his fees for services rendered for the United States, for summoning jurors and witnesses in behalf of the United States, and in behalf of any prisoner to be tried for a capital offence, for the maintenance of prisoners of the United States confined in jail for any criminal offence; also for his reasonable actual expense for the transportation of criminals, and of the marshal and guards, to prisons designated by the Attorney-General, and for hire and subsistence in that behalf, as hereinbefore provided; also his fees for the commitment or discharge of prisoner; his expenses necessarily incurred for fuel, lights, and other contingencies that may accrue in holding the court within this district, and providing the books necessary to record the proceedings thereof: *Provided*, that he shall not incur, or be allowed, an expense of more than twenty dollars in any one year for furniture, or fifty dollars for rent of a building, and making improvements thereon, without first submitting a statement and estimates to the Attorney-General and getting his instructions in the premises.”¹³⁰ A marshal's clerk is not an officer of the court, and is entitled to fees and mileage, if he is used as a witness for the government.¹³¹ A deputy marshal is an officer of the court, and is entitled to a *per diem* allowance and mileage if he is summoned as a witness for the government when he is not in attendance at court.¹³² Where the marshal's fees and compensation for services rendered the United States are fixed by some positive statutory rule, whether for enumerated or non-enumerated services, they must be certified to and paid out of the Treasury, and cannot lawfully constitute any part of the judgment or decree in the cause.¹³³ No *per diem* allowance can properly be made to any marshal or deputy marshal for attend-

¹²⁷ Wallace v. Douglas, 103 N. C. 19.

¹²⁸ U. S. v. Ten Eyck, 4 McLean, 119.

¹²⁹ U. S. v. Patterson, 3 McLean, 53.

¹³⁰ U. S. R. S. § 830.

¹³¹ *Ex parte* Simons, 32 Fed. Rep. 681.

¹³² *Ex parte* Burdell, 32 Fed. Rep. 681.

¹³³ The Antelope, 12 Wheat. 546.

ance at rule-days of a Circuit or District Court; and when the Circuit and District Courts sit at the same time, no greater *per diem* or other allowance shall be made to any such officer than for attendance on one court.¹³⁴

Every marshal must, on the first days of January and July in each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, a written return for the half year ending on said days respectively of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. And every marshal shall state separately therein the fees and emoluments received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive. Said returns must be verified by the oath of the officer making them.¹³⁵ A marshal must account for all fees which he has earned whether he has collected them or not. The words "fees and emoluments" are held to include those earned, and not collected. But if the marshal shows that after a reasonable effort he cannot collect them, it seems that he will be credited with such as he is unable to collect;¹³⁶ but one Attorney-General decided that a marshal should not be credited in his accounts for fees which he has not collected because the parties were insolvent or non-residents.¹³⁷ All fees, charges, and emoluments to which a marshal is entitled, by reason of the discharge of the duties of his office, or in any case in which the United States will be bound by a judgment rendered therein, whether prescribed by statute or allowed by a court, or a judge thereof, should be included in the semi-annual return required of said marshal.¹³⁸ The marshals for the districts of Oregon, Nevada, New Mexico, and Arizona are "entitled to receive for the like services, double the fees hereinbefore provided;" but they shall not be allowed to retain of such fees any sum exceeding the aggregate compensation of such officer as hereinbefore provided.¹³⁹

¹³⁴ U. S. R. S. § 831.

¹³⁵ U. S. R. S. § 833.

¹³⁶ 9 A.-G. Op. 176; 11 A.-G. Op. 455.

¹³⁷ 11 A.-G. Op. 455.

¹³⁸ U. S. R. S. § 834.

¹³⁹ U. S. R. S. § 837; Act of August 7, 1882, ch. 436 (22 St. at L. 344).

The marshals of the Territories of New Mexico and Arizona respectively shall be allowed to retain of their fees and emoluments such sum as shall be necessary to make their whole compensation including salary six thousand dollars per year each, if such fees and emoluments shall be sufficient therefor.¹⁴⁰

"No marshal shall be allowed by the Attorney-General, except as provided in the next section, to retain of the fees and emoluments which he is required to include in his semi-annual return, as aforesaid, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk-hire, to be audited and allowed by the proper accounting officers of the Treasury Department, and a proper allowance to his deputies, any sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year. The allowance to any deputy shall in no case exceed three-fourths of the fees and emoluments received or payable for the services rendered by him, and may be reduced below that rate by the Attorney-General, whenever the returns show such rate to be unreasonable."¹⁴¹ But "marshals may be allowed to retain, for all official services in prize causes, an additional compensation not exceeding in amount one-half of the maximum compensation allowed to them" by Section 841 of the Revised Statutes.¹⁴² The Attorney-General cannot fix a deputy's salary; he can only reduce the rate of his compensation;¹⁴³ and under Section 841 has limited the earnings of a deputy-marshal to three thousand dollars a year.¹⁴⁴ Marshals are entitled to retain fees received, until the limit fixed as the maximum of their compensation is exceeded.¹⁴⁵ Allowances to marshals for personal compensation, for each calendar year, must be made from the fees and emoluments of that year, and not otherwise.¹⁴⁶ Every marshal must, at the time of making his half-yearly return to the Attorney-General, pay into the Treasury, or deposit, to the credit of the Treasurer, as he may be directed by the Attorney-General, any surplus of the fees and emoluments of his office which said returns show to exist over and above the compensation and allowances authorized by law to be retained by

¹⁴⁰ 26 St. at L. ch. 650; Act of July 2, 1890.

¹⁴¹ U. S. R. S. § 841.

¹⁴² U. S. R. S. § 842; U. S. v. Averill, 130 U. S. 335, 339.

¹⁴³ Phillips v. U. S., 11 Ct. of Cl. 570.

¹⁴⁴ Schloss v. Hewlett, 81 Ala. 266, 269; Reg. Dept. of Justice (1876), p. 202.

¹⁴⁵ U. S. v. Cigars, 2 Fed. R. 491; U. S. R. S. §§ 842, 844.

¹⁴⁶ U. S. R. S. § 843.

him;¹⁴⁷ and in every case where a marshal shows that a surplus may exist, the Attorney-General must cause such returns to be carefully examined, and the accounts and disbursements to be regularly audited by the proper officer of his department, and an account to be open with such officer in proper books to be provided for that purpose.¹⁴⁸ The accounts of marshals must be examined and certified by the district judge of the district for which they are appointed before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts. But no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs.¹⁴⁹

“Before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the Treasury, in favor of clerks, marshals, or district-attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and, in the presence of the district-attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law and just.”¹⁵⁰ “Accounts, and vouchers of clerks, marshals, and district-attorneys, shall be made in duplicate, to be marked respectively ‘original’ and ‘duplicate.’”¹⁵¹ The certificate is a *prima facie* evidence of the legality and correctness of the account, but the proper department may require further evidence in support of it.¹⁵²

¹⁴⁷ U. S. R. S. § 844.

¹⁴⁸ U. S. R. S. § 845.

¹⁴⁹ U. S. R. S. § 846; Act of October 2, 1888, ch. 1069 (25 St. at L. 545); U. S. v. Knox, 128 U. S. 230, 232.

¹⁵⁰ Act of February 22, 1875 (1 Suppl. U. S. R. S. 145); 18 St. at L. 333.

¹⁵¹ Act of February 22, 1875; 18 St. at L. 333 (1 Suppl. U. S. R. S. 145).

¹⁵² U. S. v. Smith, 1 Wood. & M. 184.

§ 333. **Witnesses' Fees.** — A witness' fees are, "for each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning."¹ When a witness is subpoenaed in more than one cause between the same parties, at the same court, only one travel fee and one *per diem* compensation are allowed for attendance.² Both are taxed in the case first disposed of, after which the *per diem* attendance fee alone is taxed in the other cases in the order in which they are disposed of.³ When a witness is detained in prison for want of security for his appearance, he is entitled, in addition to his subsistence, to a compensation of one dollar a day.⁴ A witness can be subpoenaed, and must be allowed mileage from and to his residence, in any part of a district, to attend a court held within that district,⁵ or from another district if he does not reside more than one hundred miles from the place of trial.⁶ If a witness in a civil case resides more than one hundred miles from the place of trial and voluntarily attends, according to the ruling in the Second Circuit, mileage for only one hundred miles can be taxed.⁷ It was held by the District Court for South Carolina that a witness for the United States, voluntarily coming to and attending court on the verbal instructions of the district attorney, is entitled to the *per diem* and mileage fees, although his residence is out of the district, and more than one hundred miles from the place at which the court is held.⁸ According to the rulings in the First Circuit,⁹ a witness is entitled to mileage from his residence, no matter how far distant it may be. The Circuit Court for Iowa lays down the rule as follows: "The general rule, therefore, is that as testimony by deposition can be taken when the witness resides more than one hundred miles from the place of trial, mileage for a greater distance is not ordinarily chargeable against the party not summon-

§ 333. ¹ U. S. R. S. § 848.

² U. S. R. S. § 848.

³ U. S. R. S. § 848.

⁴ U. S. R. S. § 848.

⁵ The Syracuse, 36 Fed. R. 830; Sims v. Schult, 40 Fed. R. 143.

⁶ U. S. R. S. § 876; The Syracuse, 36 Fed. R. 830.

⁷ Anon., 5 Blatchf. 134; Eastman v. Sherry, 37 Fed. R. 844; The Vernon, 36

Fed. R. 113; Haines v. McLaughlin, 29

Fed. R. 70; Buffalo Ins. Co. v. Prov. & Stonington S. S. Co., 29 Fed. R. 237;

Wooster v. Hill, 44 Fed. R. 819.

⁸ In re Williams, 37 Fed. R. 325.

⁹ Prouty v. Draper, 2 Story, 199; Whipple v. Cumberland Cotton Manuf. Co., 3 Story, 84; Hathaway v. Roach, 2 W. & M. 63; U. S. v. Sanborn, 28 Fed. R. 299.

ing the witness."¹⁰ And this it holds to be the rule, whether the witness resides within or without the district,¹¹ and that, as between the witness and the party summoning him, the witness is entitled to the mileage and *per diem* fees, whatever the distance travelled.¹² The Circuit Court for the Eastern District of Missouri holds that a witness residing within the district may be allowed mileage for more than one hundred miles.¹³ It has been held by the District Court for South Carolina, that a person is entitled to mileage from his place of residence, when, under a subpoena as a witness of the United States, he attended court, and the case was continued, and the witnesses were verbally instructed to attend at the next term, even though in the mean time he has removed his residence into another State, and without further summons attends court and is used as a witness by the United States.¹⁴ In the First Circuit, when a witness, without having been summoned, has travelled from and to the place of his residence, which is more than one hundred miles from the place of trial and in another State and district, mileage is allowed for the whole distance.¹⁵ A witness does not lose his right to his fees merely because he was not subpoenaed, if his attendance and examination were procured in good faith.¹⁶ Nor if he attend, but is not examined;¹⁷ nor, it seems, if he is required to attend at the hearing after his deposition has been taken;¹⁸ nor does he suffer any abatement of them, because he is summoned to attend at the same time to testify in several suits, whenever some but not all the parties are the same;¹⁹ not even if both suits are tried together and the witness is examined but once, provided no order consolidating the suit has been obtained.²⁰ When the hearing is postponed on account of the illness of counsel, and the witnesses are required to remain during

¹⁰ *Smith v. Chicago & N. W. Ry. Co.*, 38 Fed. R. 321. See *Manufacturing Co. v. Saliers*, 6 Cent. L. J. 82.

¹¹ *Smith v. Chicago & N. W. Ry. Co.*, 38 Fed. R. 321.

¹² *Smith v. Chicago & N. W. Ry. Co.*, 38 Fed. R. 321.

¹³ *Sims v. Schult*, 40 Fed. R. 143. See *Holmes v. Sheridan*, 1 Dill. 421, note. See *Manufacturing Co. v. Saliers*, 6 Cent. L. J. 82.

¹⁴ *In re Williams*, 37 Fed. R. 325.

¹⁵ *United States v. Sanborn*, 28 Fed. R. 399.

¹⁶ *Anderson v. Moe*, 1 Abb. (U. S.) 299; *United States v. Sanborn*, 28 Fed. R. 299; *The Vernon*, 36 Fed. R. 113; *The Syracuse*, 36 Fed. R. 830; *Eastman v. Sherry*, 37 Fed. R. 844.

¹⁷ *Hathaway v. Roach*, 2 W. & M. 63.

¹⁸ *Beckwith v. Easton*, 4 Benedict, 357; *Anderson v. Moe*, 1 Abb. (U. S.) 299.

¹⁹ *Parker v. Bigler*, 1 Fisher, 285; *The Vernon*, 36 Fed. R. 113; *Archer v. Hartford Fire Ins. Co.*, 31 Fed. R. 660.

²⁰ *The Vernon*, 36 Fed. R. 113; *Archer v. Hartford Fire Ins. Co.*, 31 Fed. Rep. 660.

the postponement, they must be paid for the intervening time.²¹ So, also, when the witnesses are required to remain after their examination to the end of the hearing.²² It has been held that when a person has been served with a subpoena and has received money for travelling expenses, he cannot refuse to obey such subpoena because the proper amount of mileage has not been paid.²³ And persons subpoenaed as witnesses in the courts of the United States, if they have the means, are obliged to obey whether their fees are advanced or not.²⁴ If a witness is subpoenaed at the place of trial on the day when the subpoena requires him to attend, he is not entitled to any mileage.²⁵ Fees for travel of witnesses in going and returning can only be taxed once for each occasion of taking testimony, although each occasion embraces a number of days;²⁶ unless his second attendance was required by an adjournment caused by the fault of the unsuccessful party, when his travelling fees may be taxed for his attendance at such adjourned day if incurred.²⁷ It is not necessary that a witness should actually be called and sworn on the trial in order to entitle him to fees.²⁸ A witness subpoenaed by the prevailing party to the suit cannot upon his own motion have his fees that remain unpaid taxed in the bill of costs against the losing party; and it seems that a party cannot have such fees taxed until he has paid the witness, either before or after the service has been rendered, and before judgment for costs.²⁹ Witnesses do not lose their right to mileage and *per diem* fees by not insisting upon prepayment; nor by the fact that they were in attendance on the court in another cause between different parties, and received *per diem* and mileage fees therefor.³⁰ And witnesses summoned and attending court are entitled to their mileage and *per diem* fees if the cause was docketed and could have been tried at the term at which the witnesses attended.³¹ Where witnesses were subpoenaed to testify to a particular point, though the opposite party admitted

²¹ Whipple v. Cumberland Cotton Manuf. Co., 3 Story, 84.

²² Whipple v. Cumberland Cotton Manuf. Co., 3 Story, 84.

²³ Norris v. Hassler, 23 Fed. R. 581; U. S. v. Durling, 4 Biss. 509.

²⁴ Norris v. Hassler, 23 Fed. R. 581; U. S. v. Durling, 4 Biss. 509, 510; Hake v. Brown, 44 Fed. R. 734.

²⁵ The Sunnyside, 5 Benedict, 162.

²⁶ Spill v. Celluloid Manuf. Co., 28 Fed. R. 870.

²⁷ Hake v. Brown, 44 Fed. R. 734.

²⁸ Clark v. Am. Dock & Improvement Co., 25 Fed. R. 641; Hathaway v. Roach, 3 W. & M. 63.

²⁹ O'Neil v. Kansas City S. & M. R. Co., 31 Fed. R. 663.

³⁰ Young v. Merchants' Ins. Co., 29 Fed. R. 273.

³¹ Young v. Merchants' Ins. Co., 29 Fed. R. 273.

the point, mileage and *per diem* fees up to the time of such admission were allowed;³² and a second trial being had, and no stipulation or entry made on the record that the point would be admitted at such second trial, such *per diem* and mileage fees were allowed for attendance at that trial also.³³ But it is held, on the other hand, that a party may not tax the fees of a witness whom he has subpoenaed, but whose testimony is either abandoned or stricken out;³⁴ nor may he tax the fees of more than three witnesses to a single fact;³⁵ nor fees and mileage for himself when he testifies in his own behalf,³⁶ nor fees which he has not paid.³⁷ Where a defendant corporation was ordered to account before a master in a suit for an infringement of a patent, the officers thereof attending as witnesses were held not entitled to mileage and *per diem* fees upon the taxation of costs by such defendant.³⁸ Only the necessary expenses of a government clerk sent away from his place of business as a witness for the government will be paid, and nothing can be taxed in the bill of costs for his travel or attendance.³⁹ The same rule applies to deputy-clerks, as they are also officers of the court.⁴⁰ But clerks employed by the marshal in his office, keeping his accounts, are not officers of the court, and are entitled to fees and mileage.⁴¹ A deputy-marshal is an officer of the court; but unless he is actually engaged in attendance upon the court, he is entitled to *per diem* fees and mileage, if summoned as a witness by the government.⁴²

§ 334. **Miscellaneous Disbursements.** — The Federal courts are not absolutely limited in the taxation of costs to such items as are specifically named in the statute.¹ Disbursements for printing the record, evidence, and other papers in a suit in equity in a Circuit Court, when required by rule, are, at least in the First and Second Circuits, taxable as costs.² Disbursements for printing testimony and other papers for the court, when not required by

³² *Young v. Merchants' Ins. Co.*, 29 Fed. R. 273.

³³ *Young v. Merchants' Ins. Co.*, 29 Fed. R. 273.

³⁴ *Troy Iron & Nail Factory v. Corning*, 7 Blatchf. 16.

³⁵ *Bussard v. Catalino*, 2 Cranch C. C. 521.

³⁶ *Nichols v. Brunswick*, 3 Cliff. 88.

³⁷ *Leary v. Miranda*, 40 Fed. 607.

³⁸ *Am. Diamond Drill Co. v. Sullivan Mach. Co.*, 32 Fed. R. 552.

³⁹ U. S. R. S. § 850; U. S. R. S. § 849; *United States v. Sanborn*, 28 Fed. R. 299.

⁴⁰ *Ex parte Burdell*, 32 Fed. R. 681.

⁴¹ *Ex parte Burdell*, 32 Fed. R. 681.

⁴² *Ex parte Burdell*, 32 Fed. R. 681.

§ 334. ¹ *Spaulding v. Tucker*, 2 Sawyer, 50; *Gunther v. Liverpool, L. & G. Ins. Co.*, 10 Fed. R. 830.

² *Jordan v. Agawan Woollen Co.*, 3 Cliff. 239; *Dennis v. Eddy*, 12 Blatchf. 195; *Hake v. Brown*, 44 Fed. R. 734. *Contra*, *Lee v. Simpson*, 42 Fed. R. 434.

rule or special order, cannot be thus taxed.³ The appellant or plaintiff in error, when allowed costs, may tax his disbursements for clerk's fees and for printing the record.⁴ Where, upon an appeal from a decree dismissing a bill which was affirmed with costs, the defendant had taken a cross appeal from the dismissal of his cross-bill, which appeal was dismissed, the cross appellant was allowed to tax the fees paid for one half the cost of printing the record.⁵ Where the costs of printing the record on an appeal had been paid by a receiver under an order out of the fund in his hands, the defendant who finally succeeded was allowed to tax these disbursements,⁶ but not the receiver's fees and the necessary disbursements incidental to the receivership.⁷ Disbursements for printing objections to a petition to the Supreme Court in its original jurisdiction, for a writ of mandamus, are taxable.⁸ Disbursements for printing briefs on appeal, in error, or in original proceedings in the Supreme Court, are not taxable.⁸ Disbursements for printing briefs which the rules require to be printed are taxable in the Circuit Court of Appeals and the Circuit Courts in the Second Circuit,⁹ even when the brief is printed after the argument.¹⁰ If copies of papers, necessarily obtained for use, are put in evidence, and no order is made rejecting them as evidence, it is the duty of the clerk to allow, on taxation, the disbursements paid for the various copies put in evidence and forming part of the record for final hearings.¹¹ It has been held that fees paid for certified copies of a party's own muniments of title cannot be taxed, since he is presumed to have the originals in his possession, unless he proves the contrary; but that he may tax fees paid for transcripts of records of suits and other papers on which he relied to defeat his adversary's claim of title.¹² Copies of papers obtained for use on interlocutory or preliminary or incidental motions or hearings are not obtained for use on trials, and disbursements in procuring them have been disallowed.¹³ Disbursements taxable in a

³ *Spaulding v. Tucker*, 2 Sawyer, 50.

⁴ Supreme Court Rule 10; Circuit Court of Appeals Rule 23.

⁵ *Nichols, Shepard & Co. v. Marsh*, 131 U. S. 401.

⁶ *Ferguson v. Dent*, 45 Fed. R. 88, 94.

⁷ *Ferguson v. Dent*, 45 Fed. R. 88, 96.

⁸ *Ex parte Hughes*, 114 U. S. 548.

⁹ *Hake v. Brown*, 44 Fed. R. 734; *Dennis v. Eddy*, 12 Blatchf. 195.

¹⁰ *Sackett v. Smith*, 46 Fed. R. 39.

¹¹ *Wooster v. Handy*, 23 Fed. R. 49.

¹² *Ford v. Louisville, N. O. & T. Ry. Co.*, 45 Fed. R. 210.

¹³ *Wooster v. Handy*, 23 Fed. R. 49. In the Second Circuit fees paid for copies of opinions for use in preparing orders are usually taxed.

State court may when made be taxed in an action at common law in a Federal court held in the same State.¹⁴ For taking and certifying depositions the Federal court will tax, in favor of a clerk of the court or of a commissioner, the same fees as are allowed by Congress for that service to any State official taking the deposition, and not the fees allowed by the State law for a similar service.¹⁵ Fees paid an attorney for the examination of a witness before a master or special examiner,¹⁶ payments to an attorney for travelling expenses,¹⁷ payments to messengers,¹⁸ payments to witnesses for services in examining property concerning which they afterwards testified,¹⁹ cannot be taxed. Disbursements for surveys and plans necessitated by an order to make a pleading more definite and certain, cannot be taxed.²⁰ Disbursements for copies of models in the Patent Office used as evidence are taxable,²¹ but not disbursements for other models.²² It has been held that notarial fees for presentment and protest of a note, though paid before suit was brought, are considered as costs, not as damages.²³ When the defendant finally prevailed, and a decree directing him to account was set aside, he was allowed to include in his bill of costs the fees which he had been obliged to pay the master.²⁴ A defendant who finally prevails cannot tax the costs he has paid upon the overruling of his demurrer to the bill.²⁵

§ 335. **Costs out of the Fund.** Costs are paid out of a fund or estate in the course of distribution by a court of equity, to trustees who have been obliged to engage in litigation for the benefit of the estate, and to persons who have been successful in suits brought by them on behalf of themselves and others similarly situated.¹ The expression "trustees" is used here in the broadest sense of the word, as including not only those appointed by a deed of trust, but also agents, receivers,² and personal represen-

¹⁴ *Huntress v. Epsom*, 15 Fed. R. 732.

¹⁵ *Jerman v. Stewart*, 12 Fed. R. 271.

¹⁶ *Strauss v. Meyer*, 22 Fed. R. 467.

¹⁷ *Wooster v. Handy*, 23 Fed. R. 49.

¹⁸ *Wooster v. Handy*, 23 Fed. R. 49.

¹⁹ *Tuck v. Olds*, 29 Fed. R. 883.

²⁰ *New Hampshire Land Co. v. Tilton*, 29 Fed. R. 764.

²¹ *Wooster v. Handy*, 23 Fed. R. 49.

²² *Wooster v. Handy*, 23 Fed. R. 49.

²³ *Baker v. Howell*, 44 Fed. R. 113; *supra*, § 16.

²⁴ *American Diamond Drill Co. v. Sullivan M. Co.*, 32 Fed. R. 552.

²⁵ *N. Y. Belting & Packing Co. v. N. J. Car Spring & Rubber Co.*, 32 Fed. R. 755.

§ 335. ¹ *Cowdrey v. Galveston, H. & H. R. R. Co.*, 93 U. S. 352; *Trustees v. Greenough*, 105 U. S. 527; *Central R. R. & B. Co. v. Pettus*, 113 U. S. 116.

² *Attorney-General v. The City of London*, 1 Ves. Jr. 243; s. c. 3 Bro. C. C. 171; *Curteis v. Candler*, Mad. & Geld. 123; *Stuart v. Boulware*, 133 U. S. 78.

tatives.³ All of these, when under a bill for an accounting they account fairly and pay the balance due from them into court, are entitled to their costs,⁴ provided that they have not acted unconscientiously in the suit⁵ or in the previous administration of their trust.⁶ The same is true when a suit is honestly commenced by one of them for the directions of the court concerning his trusteeship.⁷ But in suits brought by or against any of them, except possibly receivers, to which a stranger is a party, they are, if unsuccessful, liable personally to him for the costs as between party and party,⁸ which costs, together with the expenses of the suit, will be allowed them upon their accounting,⁹ if the suit was prosecuted or defended in good faith for the benefit of their trust.¹⁰ Costs will also be paid out of a fund under the control of a court of equity to persons who have been successful in a suit concerning it, brought by them in behalf of themselves and others similarly situated with them.¹¹ Instances of this are a suit brought by a single creditor for a general administration of assets,¹² and by a single beneficiary of a trust to prevent a loss to the trust estate.¹³ Costs have been allowed in a similar case to a party who by his litigation had benefited the fund, although he eventually failed to establish his claim against it.¹⁴ Such costs are, in the distribution of the fund, paid before all claims against it, except those of trustees who have not been guilty of misconduct.¹⁵ The same rule applies to a suit brought by a single creditor of the estate against an executor or administrator for the

³ *Rashleigh v. Master*, 1 Ves. Jr. 201; *Samuel v. Jones*, 2 Hare, 246.

⁴ *Attorney-General v. The City of London*, 1 Ves. Jr. 243; s.c. 3 Bro. C. C. 171; *Rashleigh v. Master*, 1 Ves. Jr. 201; *Samuel v. Jones*, 2 Hare, 246; *Curteis v. Candler*, Mad. & Geld. 123.

⁵ *Henley v. Philips*, 2 Atk. 48; *Lloyd v. Spillat*, 3 P. Wms. 344, 346.

⁶ *Howard v. Rhodes*, 1 Keen, 581; *O'Callaghan v. Cooper*, 5 Ves. 117, 129; *Hide v. Haywood*, 2 Atk. 126.

⁷ *Hicks v. Wrench*, Mad. & Geld. 93; *Henley v. Philips*, 2 Atk. 48.

⁸ *Edwards v. Harvey*, G. Cooper, 40; *Poole v. Franks*, 1 Molloy, 78; *Westley v. Williamson*, 2 Molloy, 458. See § 251.

⁹ *Cowdrey v. Galveston, H. & H. R. R. Co.*, 93 U. S. 352; *Humphrys v. Moore*, 2 Atk. 108.

¹⁰ *Henley v. Philips*, 2 Atk. 48; *Lloyd v. Spillat*, 3 P. Wms. 344, 346.

¹¹ *Trustees v. Greenough*, 105 U. S. 527; *Central R. R. & B. Co. v. Pettus*, 113 U. S. 116; *Ex parte Jaffray*, *In re Waite & Crocker*, 1 Lowell, 321; *Ex parte Plitt*, 2 Wall. Jr. 453; *Stewart v. Chesapeake & Ohio Canal Co.*, 5 Fed. R. 149.

¹² *Bennet v. Going*, 1 Molloy, 527; *Hare v. Rose*, 2 Ves. Sen. 558. See, however, *Mason v. Codwise*, 6 J. Ch. (N. Y.) 183.

¹³ *Trustees v. Greenough*, 105 U. S. 527; *Stewart v. Chesapeake & Ohio Canal Co.*, 5 Fed. R. 149.

¹⁴ *Ex parte Plitt*, 2 Wall. Jr. 453; *Fecheimer v. Baum*, 43 Fed. R. 719, 730.

¹⁵ *Bennet v. Going*, 1 Molloy, 529.

satisfaction of his own claim.¹⁶ In such a case the personal representative can only recover his costs from that part of the estate which remains after the complainant has been paid the full amount of his claim with costs, even though the creditor thus sweeps away the entire estate.¹⁷ Not so, however, when a bill is filed by one creditor in behalf of himself and the rest for a general administration of assets; in which case the personal representative is always entitled to his costs out of the fund unless he has forfeited them by his misconduct.¹⁸

§ 336. **Costs as between Solicitor and Client.** — Costs payable out of a fund in court are termed costs as between solicitor and client.¹ Costs as between solicitor and client include all reasonable expenses and counsel fees, and are not, like costs as between party and party, confined to the amount named in the statute.² Five per centum of the fund collected was held a reasonable counsel fee in such a case, when the fund was large, — that is, more than seventy-five thousand dollars.³ Ten per centum of the fund collected was held a reasonable counsel fee in such a case, when the fund was small, — that is, less than five thousand dollars.⁴ In no case, however, will the personal expenses and compensation for the personal services of a person, not a trustee, who has engaged in litigation in behalf of himself and others, be included in them.⁵

§ 337. **Taxation of Costs.** — Costs as between party and party are taxed by a judge or clerk of the court upon notice to the adverse party, and are included in and form a portion of the judgment or decree.¹ To each bill of costs should be attached an affidavit by some person acquainted with the facts, stating that the services for which fees are charged were performed.² It has been said that the court will not on the taxation enforce a stipulation that disbursements not allowed by rule or statute may

¹⁶ *Humphrys v. Moore*, 2 Atk. 108; *Crocker*, 1 Lowell, 321; *Ex parte Plitt*, 2 Wall. Jr. 453.

¹⁷ *Adair v. Shaw*, 1 Sch. & Lef. 243, 280; *Uvedale v. Uvedale*, 3 Atk. 117.

¹⁸ *Bennet v. Going*, 1 Molloy, 529; *Young v. Everest*, 1 R. & M. 426; *Minuse v. Cox*, 5 J. Ch. (N. Y.) 441.

§ 336. ¹ *Trustees v. Greenough*, 105 U. S. 527.

² *Trustees v. Greenough*, 105 U. S. 527; *Cowdrey v. G. H. & H. R. R. Co.*, 93 U. S. 352; *Ex parte Jaffray*, *In re Waite &*

Crocker, 1 Lowell, 321; *Ex parte Plitt*, 2 Wall. Jr. 453.

³ *Fechheimer v. Baum*, 43 Fed. R. 719; *Central R. R. & Banking Co. v. Pettus*, 113 U. S. 116, 128.

⁴ *Adams v. Kepler Milling Co.*, 38 Fed. R. 281.

⁵ *Trustees v. Greenough*, 105 U. S. 527. § 337. ¹ U. S. R. S. § 983.

² U. S. R. S. § 984; *Jerman v. Stewart*, 12 Fed. R. 271.

be included in the bill of costs.³ The bills when taxed must be filed with the papers in the cause.⁴ When the taxation is by the clerk, a motion for a retaxation of the costs may be made before, or an appeal taken to, a judge of the court.⁵ A party who objects to a charge in lump should demand a specification of the items of which it is composed.⁶ Where there is a dispute as to a question of fact, material to the taxation of a bill of costs, a reference may be had to an auditor.⁷ Costs as between solicitor and client are taxed by the court, usually by means of a reference to a master.⁸ An appeal from a decree containing an erroneous allowance of such costs can be made, provided that their amount is sufficient to give the appellate court jurisdiction.⁹ Upon such an appeal, that court may reverse the decree if the costs have been awarded upon erroneous principles; ¹⁰ but will very rarely do so merely because it considers the sum allowed for a counsel fee too large.¹¹

§ 338. **Security for Costs.** — A complainant who does not reside within the district may be compelled to give security for costs.¹ Such security may also be required of a non-resident defendant to a bill of interpleader when he takes aggressive action.² In order to obtain an order compelling such security, the defendant must move for it as soon as he ascertains the plaintiff's residence.³ If he takes after such discovery any step in the cause before moving, it seems that he thereby waives his right to security,⁴ unless a necessity for unforeseen disbursements, such as the expense of a reference, subsequently arises.⁵ Upon a failure

³ *Lee v. Simpson*, 42 Fed. R. 434.

⁴ U. S. R. S. § 983.

⁵ *Re Strauss v. Meyer*, 22 Fed. R. 167; *Tuck v. Olds*, 28 Fed. R. 883.

⁶ *Dedekam v. Vose*, 3 Blatchf. 153.

⁷ *Bottomley v. U. S.*, 1 Story, 153.

⁸ *Trustees v. Greenough*, 105 U. S. 527; *Central R. R. & B. Co. v. Pettus*, 113 U. S. 116; *Cowdrey v. G. H. & H. R. R. Co.*, 93 U. S. 352.

⁹ *Trustees v. Greenough*, 105 U. S. 527; *Angell v. Davis*, 4 Myl. & C. 360.

¹⁰ *Trustees v. Greenough*, 105 U. S. 527; *Central R. R. & B. Co. v. Pettus*, 113 U. S. 116.

¹¹ *Trustees v. Greenough*, 105 U. S. 527; *Stuart v. Boulware*, 133 U. S. 78. But see *Central R. R. & B. Co. v. Pettus*, 113 U. S. 116.

§ 338. ¹ *Lyman Ventilating & Refrigerator Co. Southard*, 12 Blatchf. 405. But see *Woodworth v. Sherman*, 3 Story, 171.

² *Gross & Phillips Manuf. Co. v. Gerhard*, 8 Reporter, 136.

³ *Migliorucci v. Migliorucci*, 1 Dickens, 147; *Foster v. Swasey*, 2 W. & M. 217; *Bliss v. Brooklyn*, 10 Blatchf. 217; *Prince v. Towns*, 33 Fed. R. 161.

⁴ *Migliorucci v. Migliorucci*, 1 Dickens, 147; *Foster v. Swasey*, 2 W. & M. 217; *Bliss v. Brooklyn*, 10 Blatchf. 217; *Prince v. Towns*, 33 Fed. R. 161. But see *Stewart v. The Sun*, 36 Fed. R. 307.

⁵ *Uhle v. Burnham*, 46 Fed. Reporter 500.

to file security when required, the plaintiff's proceedings will be stayed.⁶ The plaintiff's proceedings may be stayed until he pays the costs of another suit between the same parties upon the same cause of action in which he was unsuccessful, even if that other suit was in a State court.⁷ When one of several plaintiffs is a resident of the district, it seems that no security for costs will be required.⁸ If the defendant do not demand security for costs within a reasonable time; that such security has not been given will not, when the cause is called for trial, be a ground for a continuance.⁹ Where a plaintiff has recovered judgment against a solvent defendant, and process is outstanding in the nature of an execution to collect the same, it is not proper to require the plaintiff to make a deposit to secure costs due a commissioner.¹⁰ It was held in New York, by Chancellor Kent, that a person who sued in another's right, as an executor or administrator, could not be compelled to give security for costs.¹¹

⁶ *Fox v. Blew*, 5 Madd. 147.

⁹ *Hawkins v. Willbank*, 4 Wash 285.

⁷ *Buckles v. Chicago, M. & St. P. Ry. Co.*, 47 Fed. R. 424.

¹⁰ *U. S. v. St. Charles Co.*, 31 Fed. R. 442.

⁸ *Winthrop v. Royal Exch. Ass. Co.*, 1 Dickens, 282; *Walker v. Easterby*, 6 Ves. 612; *Gilbert v. Gilbert*, 2 Paige Ch. (N. Y.) 603.

¹¹ *Goodrich v. Pendleton*, 3 J. Ch. (N. Y.) 520. See *Cathcart v. Hewson*, 1 Hayes, 173.

CHAPTER XXVI.

ENFORCEMENT OF DECREES AND ORDERS.

§ 339. **Enforcement of Decrees and Orders in General.** — Decrees and orders are enforced in six ways: by writ of execution,¹ by attachment,² by writ of sequestration,³ by writ of assistance,⁴ by the action of the court itself through the medium of a master⁵ or receiver,⁶ and by bills to carry decrees into execution.⁷ Equity Rule 10 provides as follows: "Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause."

§ 340. **Executions.** — The rules provide that "final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of assumpsit."¹ A decree for a deficiency after a sale of mortgaged property in a foreclosure suit is enforced in the same manner.² By a statute passed June 1, 1872, and re-enacted December 1, 1873, "the party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereinafter enacted which are adopted by general rules of such circuit or district court: and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be

§ 339. ¹ §§ 340, 380.

² §§ 341-346.

³ § 347.

⁴ § 348.

⁵ § 349.

⁶ Chapter XVII.

⁷ § 349 a.

§ 340. ¹ Rule 8. See § 380.

² Rule 92.

in force in such State in relation to remedies upon judgments, as aforesaid by execution or otherwise.”³ In cases where an appeal lies to or a writ of error may issue from the Supreme Court, the execution cannot issue till the expiration of ten days from the entry of the decree or judgment.⁴ The writ may, however, be previously prepared by the clerk.⁵ The marshal in the courts of the United States has duties analogous to those of the sheriff in the different States.⁶ It is his duty “to attend the district and circuit courts when sitting in his district, and to execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty.”⁷ They have the right under the direction of the Attorney-General to protect judges of the courts of the United States while in the discharge of their official duties, and while on their way to hold court, and if necessary, to take human life in their defense.⁸ “The marshals and their deputies have, in each State, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such State have by law, in executing the laws thereof.”⁹ Under these provisions of the Revised Statutes, the marshal or his deputy, if resisted when in the performance of his duty, may call to his aid a sufficient force from his district, called the *posse comitatus*, or power of his county, from the corresponding force which the sheriff or county officer has at his command,¹⁰ — that is, such number of men as are necessary for his assistance in the execution of the writs of the United States; and herein every person above the age of fifteen and able to travel is bound to be aiding, and if they refuse to assist, may be punished by fine and imprisonment.¹¹ It has been said, that this force by the common law included all persons, whatever might be their occupation, whether civilians or not; and including the military of all denominations, — militia, soldiers, marines, — all of whom were alike bound to obey the commands of a sheriff or marshal. “The fact that they are organized

³ U. S. R. S. § 916. See *Lamaster v. Keeler*, 123 U. S. 376, and *infra*, § 380.

⁴ U. S. R. S. § 1008.

⁵ *Board of Commissioners v. Gorman*, 19 Wall. 661.

⁶ *In re Neagle*, 135 U. S. 1; s. c. 39 Fed. R. 833; U. S. R. S. § 788.

⁷ U. S. R. S. § 787.

⁸ *In re Neagle*, 135 U. S. 1; s. c. 39 Fed. R. 833.

⁹ U. S. R. S. § 788; *In re Neagle*, 135 U. S. 1, 68.

¹⁰ 6 Op. Att’y-Gen 466, 469.

¹¹ *Bac. Abr. Sheriff* (11).

as military bodies, under the immediate command of their own officers, does not in any wise affect their legal character. They are still the *posse comitatus*.”¹² A recent act of Congress has, however, provided, that “From and after the passage of this act it shall not be lawful to employ any part of the army of the United States as a *posse comitatus*, or otherwise for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by Act of Congress.”¹³ Under this act, it seems that aid of the army cannot be obtained by a marshal unless the President shall employ it to suppress insurrection after a proclamation commanding the insurgents to disperse.¹⁴ The marshal and his deputies may carry arms and use force in the execution of their official duty although a State statute forbids carrying concealed weapons;¹⁵ but they may not make arrests nor carry arms outside of the districts for which they are appointed.¹⁶ All writs of execution upon judgments or decrees obtained in a Circuit or District Court, in any State which is divided into two or more districts, may run and be executed in any part of such State; but must be issued from and made returnable to the court wherein the judgment was obtained.¹⁷ In such a case, the writ may be executed, by the marshal of the district from which it was issued, in the other district without any independent writ being directed to him for that purpose.¹⁸ All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one State, may run and be executed in any other State or in any Territory, but must be issued from, and made returnable to, the court wherein the judgment was obtained.¹⁹ A suit against a marshal for an alleged failure to comply with the laws of the State in levying an execution arises under the Constitution and laws of the United States.²⁰

§ 341. **Contempts.**—An attachment is the proper process to compel obedience to a decree or order requiring the perform-

¹² 6 Op. Att’y-Gen. 466, 473.

¹³ Act of June 18, 1878, § 15; 20 St. at L. 145; 1 Sup. U. S. R. S. 363.

¹⁴ 16 Op. Att’y-Gen. 162; U. S. R. S. 151.

§§ 5298, 5300.

¹⁵ U. S. *ex rel.* McSweeney v. Fullhart,

47 Fed. R. 802; Sifford’s Case, 5 Am.

Law Reg. 659.

¹⁶ Walker v. Lea, 47 Fed. R. 645.

¹⁷ U. S. R. S. § 985. See pp. 58–63.

¹⁸ Prevost v. Gorrell, 5 W. N. C. (Pa.)

¹⁹ U. S. R. S. § 986.

²⁰ Sowles v. Witters, 46 Fed. R. 497.

See § 17.

ance of a specific act other than the payment of money,¹ or to punish a contempt of court.² It seems, that in districts held in States where imprisonment for debt has been abolished, disobedience to a decree or order for the payment of money cannot be punished by attachment;³ unless the defaulting party is an officer of the court, as an attorney,⁴ or has bid in property at a judicial sale;⁵ or the motion is made by a master or the clerk of the Supreme Court to compel payment of his fees.⁶ The older cases both in the English Chancery and the Federal courts hold that it is a contempt to criticise in the press the conduct of the court,⁷ and to publish anything which may create prejudice against either party to a pending cause.⁸ A case in which punishment was inflicted by Judge Peck for a criticism published upon one of his decisions led to his impeachment trial before the Senate; and although he was acquitted, a statute was enacted which materially diminished the powers of the Federal courts to punish for contempt.⁹ The courts of the United States have power "to punish by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other persons, to any lawful writ, process, order, rule, decree, or command of the said courts."¹⁰ Beyond this the Circuit and District Courts have no such power.¹¹ The act, just quoted in terms, applies to all courts. Whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, is doubtful.¹² It has been held

§ 341. ¹ Rule 8; Mallory Manuf. Co. v. Fox, 20 Fed. R. 409.

² U. S. R. S. § 725; *Re Chiles*, 22 Wall. 157.

³ Mallory Manuf. Co. v. Fox, 20 Fed. R. 409.

⁴ *Jeffries v. Laurie*, 27 Fed. R. 195; *Re Pitman*, 1 Curtis, 186; *Bagley v. Yates*, 3 McLean, 465; *The Laurens*, 1 Abb. Adm. 508; *Re Paschal*, 10 Wall. 483; *U. S. v. Mann*, 2 Brock. 9.

⁵ *Camden v. Mayhew*, 129 U. S. 73.

⁶ Rule 82; Supreme Court Rule 10.

⁷ See the language of Lord Chancellor Hardwicke in 2 Atk. 469, 471. *Hollingsworth v. Duane*, Wall. C. C. 77, 100;

U. S. v. Duane, Wall. C. C. 102.

⁸ 2 Atk. 469.

⁹ U. S. R. S. § 725.

¹⁰ U. S. R. S. § 725.

¹¹ *Ex parte Robinson*, 19 Wall. 505, 510.

¹² Mr. Justice Field in *Ex parte Robinson*, 19 Wall. 505, 510.

at circuit that a United States commissioner has no power to punish for contempt.¹³ It was held to be a contempt of court to sue in a court of another State a party while there for the purpose of attending the taking of a deposition; and a fine of the expenses of such suit including the counsel fees therein, was imposed upon the party who brought it.¹⁴ Misbehavior of a person in the presence of the court may consist in an assault,¹⁵ or in abusive language addressed to the court¹⁶ or one of its officers¹⁷ or any person there.¹⁸ Similar conduct in an ante-room of the court or so near the court-room as to be heard therein is also punishable as a contempt.¹⁹ It has been said to be a contempt for an attorney to carry a pistol into court.²⁰ A hearing before a master in chancery or examiner is, for this purpose, treated as a proceeding in court.²¹ The cases affecting receivers have been cited in the chapter on Receivers.²² Proceedings before a grand jury are considered to be in the presence of the court;²³ and an attempt in the hall adjoining the room where a grand jury is in session to bribe a witness summoned before it is a contempt of court.²⁴ It has been held in Ohio, under a statute similar to that limiting the powers of the Federal courts to punish for contempts, that the publication of charges of misconduct against a judge holding court, in a newspaper which the writer had reason to believe would be circulated and read in the court-room, and which was thus circulated and read, is "misbehavior in the presence of or so near the court or judge as to obstruct the administration of court or justice."²⁵ It is not a contempt to serve a suitor with a summons while he is in attendance on a term of court, provided he is not served in the court's presence.²⁶ An officer of the court may be punished by attachment for his misbehavior in office after his term of office has expired by res-

¹³ *In re* Mason, 43 Fed. R. 510; *Re* Perkins, cited 43 Fed. R. 515; *Ex parte* Doll, 7 Phila. 595.

¹⁴ *Bridges v. Sheldon*, 7 Fed. R. 17, 45-47.

¹⁵ *Sharon v. Hill*, 24 Fed. R. 726; *Ex parte* Terry, 128 U. S. 289; *In re* Terry, 36 Fed. R. 419; *U. S. v. Patterson*, 26 Fed. R. 509.

¹⁶ *Ex parte* Terry, 128 U. S. 289; *In re* Terry, 36 Fed. R. 419.

¹⁷ *Ex parte* Terry, 128 U. S. 289; *In re* Terry, 36 Fed. R. 419.

¹⁸ *U. S. v. Emerson*, 4 Cranch C. C. 188; *U. S. v. Carter*, 3 Cranch C. C. 423.

¹⁹ *U. S. v. Emerson*, 4 Cranch C. C. 188.

²⁰ *Sharon v. Hill*, 24 Fed. R. 726.

²¹ *Sharon v. Hill*, 24 Fed. R. 726.

²² See § 249.

²³ *Savin, Petitioner*, 131 U. S. 267.

²⁴ *Savin, Petitioner*, 131 U. S. 267.

²⁵ *Myers v. State*, 21 Weekly Law Bulletin, 404; s. c. 22 N. E. R. 43. See *Cooper v. People*, 13 Colorado, 337.

²⁶ *Blight v. Fisher*, Peters' Circuit Court Reports, 41.

ignation or otherwise.²⁷ An attorney²⁸ or other officer²⁹ of the court may be thus compelled to pay to a person named in the order money received by him in his official capacity. Where, however, there is room for a reasonable doubt as to how much is due from the officer, the court will usually refuse to proceed against him summarily, and require the complaining party to begin a suit.³⁰ A juror has been punished for contempt because he had talked about the case in violation of the court's direction to the contrary.³¹ It has been held, that a person enjoined from the infringement of a patent is in contempt if he contributes to a fund to defray the expenses of another who is contesting the validity of the patent.³² It has been held, that a defendant corporation which, when enjoined from selling a certain cordial in certain bottles with a particular label, sold its entire stock of cordials with such bottles and labels to a third person, under an arrangement that he would fill all orders for the cordial which the defendant should receive, was guilty of contempt, although it did not share in the profits of such sales, and although it acted under advice of counsel.³³ It has been said to be a contempt of court to bring before it a collusive suit.³⁴ It has been held that it is a contempt to represent by words and by printed circulars that a sale under an execution is invalid, and that any one who buys will become involved in litigation.³⁵ A person is not relieved from punishment for contempt because he acted in good faith under the advice of counsel that he was not infringing the court's order.³⁶ If, however, the question as to whether he is in contempt is doubtful, the court will not punish him.³⁷ A domestic or foreign corporation, as well as an individual, may be fined for a contempt.³⁸

²⁷ *The Laurens*, 1 Abb. Adm. 508.

²⁸ *In re Paschal*, 10 Wall. 483; *Jeffries v. Laurie*, 27 Fed. R. 195.

²⁹ *Re Pitman*, 1 Curt. 186; *Bagley v. Yates*, 3 McLean, 465; *The Laurens*, 1 Abb. Adm. 508.

³⁰ See *In re Paschal*, 10 Wall. 483; *U. S. v. Mann*, 2 Brock. 9.

³¹ *Re May*, 1 Fed. R. 737; *U. S. v. Devaughan*, 3 Cranch C. C. 84.

³² *Bate Refrigerating Co. v. Gillett*, 20 Fed. R. 683.

³³ *Société Anonyme de la Distillerie de la Liqueur Benedictine de la Abbaye de*

Fecamp v. Western Distilling Co., 42 Fed. R. 96.

³⁴ *Lord v. Veazie*, 8 How. 251; *Cleveland v. Chamberlain*, 1 Black, 419.

³⁵ *In re Sowles*, 41 Fed. R. 752.

³⁶ *Atlantic Giant Powder Co. v. Dittman Powder Manuf. Co.*, 9 Fed. R. 316.

³⁷ *California Paving Co. v. Molitor*, 113 U. S. 609; *Onderdonk v. Fanning*, 2 Fed. R. 568; *Lilienthal v. Wallach*, 37 Fed. R. 241; *Truax v. Detweiler*, 46 Fed. R. 117.

³⁸ *United States v. Memphis & L. R. R. Co.*, 6 Fed. R. 237.

§ 342. **Notice of Application for Attachment.** — The rules provide that if a decree be for the performance of a specific act, other than the payment of money, it must prescribe the time within which the act shall be done, “of which the defendant shall be bound without further service to take notice;”¹ and that, “except in cases where personal or other notice is specially required or directed,” an entry of an order in the order-book is sufficient notice thereof to the parties to the suit.² It is, however, the safer practice, if not indispensable, to make personal service of a certified copy of a decree or order, disobedience to which it is desired to punish by an attachment.³ In case of disobedience to a decree for the performance of a specific act, other than the payment of money, the rules direct the issue of an attachment *ex parte* by the clerk, upon the filing of an affidavit that the act has not been performed within the required time.⁴ It is, however, the usual practice to give notice to the delinquent, of an application for an attachment, either by an order to show cause or otherwise.⁵ An attachment may be issued at the request of a person not a party to the cause in whose favor an order has been made, or against a person not a party to the cause against whom obedience to an order can be enforced.⁶ Notice of the application, when required, should be served personally upon the person thereby affected.⁷ If a party conceals himself to avoid personal service of the notice, perhaps notice may be served upon an attorney who has appeared for him in the proceeding in which the contempt was committed.⁸ The proceeding is in its nature criminal, not civil.⁹

§ 343. **Hearing upon Applications for Attachments.** — When the contempt was committed in the presence of the court, no notice nor trial of any disputed question of fact is necessary.¹ It has

§ 342. ¹ Rule 8.

² Rule 4.

³ *In re* Cary, 10 Fed. R. 622; *In re* Lloyd, 10 Beav. 451. But see *Re* Feeny, 1 Hask. 304; s. c. 4 N. B. R. [70] 233; *Skip v. Harwood*, 3 Atk. 564; *Hearn v. Tenant*, 14 Ves. 136; *People v. Brower*, 4 Paige (N. Y.), 405.

⁴ Rule 8.

⁵ *Worcester v. Truman*, 1 McLean, 483; *Fischer v. Hayes*, 6 Fed. R. 63.

⁶ Rule 10.

⁷ *Gray v. Chicago, I. & N. R. R. Co.*, 1

Woolw. 63; *Hollingsworth v. Duane*, Wall. C. C. 141.

⁸ *Eureka L. & Y. C. Co. v. Superior Court of Yuba County*, 116 U. S. 410, 418.

⁹ *Ex parte Kearney*, 7 Wheaton, 38; *In re Pitman*, 1 Curtis, 186; *Fischer v. Hayes*, 6 Fed. R. 63; *Hayes v. Fischer*, 102 U. S. 21; *New Orleans v. Steamship Co.*, 20 Wall. 387; *Re Manning*, 44 Fed. R. 275.

§ 343. ¹ *Ex parte Terry*, 128 U. S. 289; *In re Terry*, 36 Fed. R. 419.

been held at circuit that in any other case, at least when an attachment has been issued, a person charged with contempt may demand that interrogatories be filed concerning the facts which, it is claimed, constitute his offence; and that, if he denies the facts charged under oath, he cannot be punished,—the only remedy being an indictment against him for perjury:² but a recent decision of the Supreme Court seems contrary to these rulings.³ He cannot be compelled to answer interrogatories.⁴ Otherwise, when at the argument of the motion for an attachment the party accused of disobedience denies the charge, the court may either determine the disputed question of fact upon such affidavits as are then presented to it, or refer the question to a master.⁵ If the court find the charge proved, or the master so report and his report be confirmed, the court may then punish the offender by fine or imprisonment, and, if a fine be imposed, direct him “to stand committed till it be paid.”⁶ The court may make a preliminary order directing that he be fined; determining the principles with regard to which the amount of the fine should be estimated; and directing either the submission of the amount to the court upon affidavits, or a reference to a master for that purpose.⁷ When an injunction against the infringement of a patent has been violated, the fine may include the profits made by the defendant by his contemptuous acts; and in that case the order may direct that that part of the fine be paid to the complainant.⁸ When the contempt consisted in the institution of a suit, the fine should include the expenses of the defense of such suit including reasonable counsel fees, which must be paid to the party against whom the contemptuous suit was brought.⁹ In these cases the writ of attachment does not issue till after the final order. “In proceedings in equity between parties to a suit for contempt in not obeying the process of the court, or any order or decree in the cause, the proceedings in equity between parties to a suit for

² *U. S. v. Dodge*, 2 Gall. 313; *Hollingsworth v. Duane*, Wall. C. C. 77. See *U. S. v. Duane*, Wall. C. C. 103.

³ *Savin*, Petitioner, 131 U. S. 267.

⁴ *Hollingsworth v. Duane*, Wall. C. C. 77. See *U. S. v. Duane*, Wall. C. C. 102.

⁵ *Fischer v. Hayes*, 6 Fed. R. 63. In a recent interesting case it was held that the evidence was insufficient to prove a

contempt. See *Woodruff v. North Bloomfield Gravel Min. Co.*, 45 Fed. R. 129.

⁶ *Fischer v. Hayes*, 6 Fed. R. 63; U. S. R. S. § 725.

⁷ *Fischer v. Hayes*, 6 Fed. R. 63.

⁸ *Searls v. Worden*, 13 Fed. R. 716; s. c. as *Worden v. Searls*, 121 U. S. 14, *In re Mullee*, 7 Blatchf. 23; *Doubleday v. Sherman*, 8 Blatchf. 45.

⁹ *Bridges v. Sheldon*, 7 Fed. R. 747.

contempt in not obeying the process of the court, or any order or decree in the cause, the proceedings on the attachment may be, and usually are, entitled as in the original suit, though it is not irregular to entitle them in the name of *The People*, on the relation of the person prosecuting the attachment against the defendant or party proceeded against. Where the attachment proceeding for a contempt is against a witness, or a person not a party to the suit, the practice is to entitle the order for attachment, and all subsequent proceedings thereon, in the name of *The People*, on the relation, &c."¹⁰ On a motion for a commitment for contempt when served with a subpoena, it was held that two witnesses must be produced to prove contemptuous words, but that one was sufficient to prove a battery upon the process-server.¹¹ A State statute regulating the practice in contempt proceedings does not affect the practice in the Federal court.¹²

§ 344. **Order of Commitment.**—It is better practice for the order committing a person for contempt to recite the offense charged, although it seems that this is not necessary if it describes the same by reference to other proceedings.¹ It has been said that an order committing a person for contempt cannot be altered at a subsequent term of the court;² that the court cannot subsequently discharge the party committed upon proof of his inability to comply with the order, his remedy being an application to the President for a pardon;³ and that such an order is void if it does not express or limit the term of imprisonment.⁴ No appeal will lie from an order committing a person for contempt.⁵ If such an order is void, the prisoner may be discharged on *habeas corpus*,⁶ but not for irregularities, when the court had jurisdiction to grant the order.⁷ Upon an appeal from the final decree so much of an order fining a party for contempt as gave indemnity to his antagonist may be reviewed;⁸ but not so much

¹⁰ Judge, now Mr. Justice, Blatchford in *Fischer v. Hayes*, 6 Fed. R. 63. See also *The People v. Craft*, 7 Paige (N. Y.), 235; *Stafford v. Brown*, 4 Paige (N. Y.), 361; U. S. *ex. rel.* *Southern Express Co. v. Memphis & Little Rock R. R. Co.*, 6 Fed. R. 237. But see *U. S. v. Wayne*, Wall. C. C. 134.

¹¹ *Anon.*, 3 Atkins, 219.

¹² *Searls v. Worden*, 13 Fed. R. 716.

§ 344 ¹ *Fischer v. Hayes*, 6 Fed. R. 63.

² *Fischer v. Hayes*, 6 Fed. R. 63.

³ *Re Mullee*, 7 Blatchf. 23.

⁴ *Matter of Marsh, MacArth. & M.* (D. C.) 32.

⁵ *Hayes v. Fischer*, 102 U. S. 121.

⁶ *Ex parte Fisk*, 113 U. S. 713; *Ex parte Terry*, 128 U. S. 289. See §§ 366, 367, *infra*.

⁷ *Savin, Petitioner*, 131 U. S. 267, 279; *Stevens v. Fuller*, 136 U. S. 468, 478. See §§ 366–367, *infra*.

⁸ *Worden v. Searls*, 121 U. S. 14, 26.

of the fine as was imposed solely by way of punishment to vindicate the dignity of the court.⁹ A prisoner committed for a contempt is not entitled to any credit for good behavior.¹⁰

§ 345. **Writ of Attachment.** — An attachment is a writ directed to the marshal of the court, sealed and bearing *teste* in the same manner as a writ of subpœna,¹ directing him to attach the body of the person named therein, and to safely keep the same, so that he can produce the person or persons thus attached in court at a certain day termed the return day of the writ, or until the further order of the court.² The writ must be indorsed with the special reason for which it is issued, and also with the name and address of the solicitor of the party issuing it.³ The writ may be issued either in vacation or in term; and may be returnable immediately; provided, at least, that the party against whom it is issued then dwells or is within twenty miles of the place of holding the court. Otherwise, a period of fifteen days between the *teste* and the return might be required.⁴

§ 346. **Execution of Writ of Attachment.** — The first thing to be done after the writ has been issued is to deliver it to the marshal to whom it is directed, or to one of his deputies authorized by him to receive such writs.¹ Although the writ is always directed to the marshal of the judicial district within which it is to be executed,² it is usually executed by one of his deputies. The marshal and his deputy can only execute the writ within the district for which he has been appointed;³ and not then against a person who has been brought there by force or fraud, or under such circumstances as would make it improper to serve a subpœna upon him;⁴ and probably not upon Sunday,⁵ nor usually in the court-room.⁶ If a writ is to be executed in a different district from that within which the court issuing it is situated, it should be directed to the marshal of that district.⁷ This has

⁹ *New Orleans v. Steamship Co.*, 20 Cranch C. C. 331; *Sommerville v. French*, 1 Cranch C. C. 474.

¹⁰ *In re Terry*, 37 Fed. R. 649.

§ 345. ¹ See U. S. R. S. § 911.

² *Braithwaite's Pr.* 159-161.

³ *Braithwaite's Pr.* 159.

⁴ Acts of 11 Geo. IV. & 1 Wm. IV. c. 86, § 15, note 3.

§ 346. ¹ U. S. R. S. § 787.

² U. S. R. S. § 787.

³ U. S. R. S. § 787; *In the Matter of Allen*, 13 Blatchf. 271; *Voss v. Luke*, 1

⁴ *In the Matter of Allen*, 13 Blatchf. 271; and see authorities cited under §§ 98, 277. Cf. *Wroe v. Clayton*, 16 Simons, 183.

⁵ 29 Car. II. ch. 12, § 6; and see authorities cited under § 84.

⁶ *United States v. Scholfeld*, 1 Cranch C. C. 130; *Davis v. Sherron*, 1 Cranch C. C. 287.

⁷ *Voss v. Luke*, 1 Cranch C. C. 331;

been held proper, when the writ issues to attach, for disobedience to a subpoena, a witness who lives within a hundred miles of the place of holding the court.⁸ It has been held that in other cases this cannot be done;⁹ but that, on presentation of a certified copy of the contempt proceedings and of the writ of attachment, the district attorney of the district where the delinquent is, may obtain from a commissioner of that district a warrant for the arrest of the party in contempt, who is then entitled to an examination, pending which he may be discharged on bail; and that if the commissioner decides to hold the party in contempt, the judge of that district may issue a warrant for his removal as in other criminal cases.¹⁰ If the delinquent be already in custody, either upon criminal sentence or civil process, no further arrest is necessary; but the marshal should give notice of the attachment, which notice is called a detainer, to the keeper or jailer in whose custody he is.¹¹ If a return day be appointed in a writ, and it be issued to enforce obedience to an interlocutory order, the marshal may, but is not obliged to allow the delinquent to go at large with or without security for his surrender to him upon the return day.¹² If the delinquent do not then surrender himself to the marshal's custody, the latter and his bondsmen are responsible for all damages which the court shall determine have resulted therefrom to the party at whose instance the writ was issued.¹³ It seems, however, that this cannot be done when the writ is issued for a refusal to perform a specific act in obedience to a decree.¹⁴ According to an old writer, it seems that when the marshal "has taken up the body he has paid obedience to the writ, though he does not actually bring him up to the court; because the contempt only induces a commitment, which is satisfied by imprisonment in the county gaol."¹⁵ If, however, he be specially ordered so to do, he must obey. Upon the return day of the writ the marshal should make a return thereto.

Sommerville v. French, 1 Cranch C. C. 474.

⁸ *Voss v. Luke*, 1 Cranch C. C. 331. But see *Henry v. Ricketts*, 1 Cranch C. C. 580.

⁹ *Ex parte Graham*, 3 Wash. C. C. 456, 462; *Re Manning*, 44 Fed. R. 275.

¹⁰ *United States v. Jacobi*, 4 Am. L. T. Rep. 148, 151, 152; *Re Manning*, 44 Fed. R. 275.

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¹¹ *Trotter v. Trotter*, Jacob, 533.

¹² *Morris v. Hayward*, 6 Taunton, 569; *Studd v. Acton*, 1 H. Blackstone, 468.

¹³ *Moore v. Moore*, 25 Beav. 8; U. S. R. S. §§ 783-786.

¹⁴ Rule 8; *Cowdray v. Cross*, 24 Beav. 445.

¹⁵ *Gilbert's Chan.* 83.

He cannot detain the party named in the writ after the return day, unless by the court's order.¹⁶ There are three ordinary returns upon a writ of attachment: *First*, if the delinquent cannot be arrested, the marshal returns, "The within-named John Stiles is not found in my bailiwick," — this is termed a *non est inventus*, and upon it further process of contempt is grounded; *second*, if the delinquent has been arrested, but the marshal has either accepted bail for his appearance or keeps him in his own custody, the return is, "I have attached the within named John Stiles, as within I am commanded, whose body I have ready," — this is called *accepi corpus*; *third*, if the marshal has arrested the delinquent and lodged him in jail, or, finding him there has lodged a detainer against him, the marshal returns, "I have attached the within-named John Stiles, whose body remains in [naming the jail or prison] in my custody."¹⁷ Although the return is regularly made by the marshal, no matter by whom the writ has been executed, it will not be void if made by his deputy.¹⁸ If the marshal refuse to make any return he may be compelled to do so, by means of an order to show cause followed by an attachment against himself.¹⁹ When the marshal or his deputy is a party to a cause, or probably when a writ of attachment is issued against either of them, the writs and precepts therein must be directed to such disinterested person as the court or any justice or judge thereof may appoint, and the person so appointed may execute and return them.²⁰ In such a case the person serving the process should make affidavit thereof.²¹

§ 347. **Sequestration.** — The process of sequestration is a writ or commission issuing under the seal of the court, directed either to the marshal or to certain persons of the plaintiff's nomination, empowering him or them to enter upon and sequester the real and personal estate of a defendant (or some particular parcel of his lands), and to take, receive, and sequester the rents, issues, and profits thereof, and keep the same in their hands, or pay the same in such manner and to such persons as the court shall in its discretion appoint, until such defendant shall have performed some matter, previously ordered by the court, in the process

¹⁶ *Ex parte* Burford, 1 Cranch C. C. 456.

¹⁷ Braithwaite's Pr. 272, 281.

¹⁸ Spafford v. Goodell, 3 McLean, 97.

¹⁹ *United States v. Scroggins*, 3 Woods, 529; *Daniells' Ch. Pr.* 470.

²⁰ U. S. R. S. § 923; Rule 15.

²¹ Rule 15.

specifically mentioned, for not doing whereof he is in contempt.¹ This is one of the oldest writs of the court of chancery, and has been the cause of many conflicts between the English chancellors and the courts of common law.² Much curious history and learning upon the subject invite the attention of the antiquarian; but, as it is now rarely used, little space will be devoted to it in this work. By the Equity Rules, whenever the marshal has returned *non est inventus* under a writ of attachment, a writ of sequestration may issue to compel obedience to a decree or order of the court.³ The writ, when not issued to the marshal, appoints two or more sequestrators.⁴ The usual number is four.⁵ The sequestrators are officers of the court, and as such are subject to new directions during their discharge of their functions.⁶ may be attached for disobedience or misconduct,⁷ and, if resistance be made to them, may be aided by the court with the exercise of its process of contempt,⁸ or by a writ of assistance.⁹ Sequestrators must from time to time account for what comes into their hands, and pay into court such money as they receive.¹⁰

§ 348. **Writ of Assistance.**—The Equity Rules provide that “when any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.”¹ This is a writ commanding the marshal to eject the defendant from the land and put the plaintiff in possession: and is executed in the same manner as a writ of *habere facias possessionem* is executed in favor of a successful plaintiff in the action of ejectment;² “in the execution of which the sheriff may take with him the *posse comitatus*, or power of the county, and may justify breaking open doors, if the possession be not quietly delivered.

§ 347. ¹ Hinde's Ch. Pr. 127; Hoffman's Ch. Pr. ch. iii. § 10; Daniell's Ch. Pr. ch. xxv. § 7.

² Gilbert's Forum Romanum, 78; Daniell's Ch. Pr. ch. xxv. § 7.

³ Rules 7 and 8. See Shainwald v. Lewis, 6 Fed. R. 766, 777.

⁴ Hoffman's Ch. Pr. ch. iii., § 10; Daniell's Ch. Pr. ch. xxv. § 5.

⁵ Daniell's Ch. Pr. ch. xxv. § 5.

⁶ Hinde's Ch. Pr. 138; Daniell's Ch. Pr. ch. xxv. § 7; Hoffman's Ch. Pr. ch. iii. § 10.

⁷ Lord Pelham v. Lord Harley, 3 Swanst. 291, n.

⁸ Angel v. Smith, 9 Ves. 336; Lord Pelham v. Duchess of Newcastle, 3 Swanst. 293, n.; Rule 9.

⁹ Lord Pelham v. Duchess of Newcastle, 3 Swanst. 289, n.; Rule 9.

¹⁰ Howell v. Lord Coningsby, 1 Fowl, Ex. Pr. 161; Deshrow v. Crommie, Bunb. 272.

§ 348. ¹ Rule 9.

² Hunter's Suit in Equity (6th ed.), 168.

But, if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of a door in the name of seisin, is sufficient execution of the writ."³ This writ is often used to put into possession receivers⁴ and sequestrators.⁵ It is not issued without an order for that purpose.⁶ It cannot issue against any but a party to the suit, or his representative, or one who came into possession under him since the suit was begun.⁷ The grantee of the purchaser at a foreclosure sale where the court has ordered the receiver to put him in possession of the purchased property, and where the court has retained jurisdiction of the suit, may obtain a writ of possession.⁸

§ 349. **Action by Court itself.** — In the year 1830, an act was passed in England, at the instance of Sir Edward Sugden, the author of *Sugden on Powers*, afterwards Lord St. Leonards, providing: "That when any person shall have been directed by any decree or order to execute any deed or other instrument, or make a surrender or transfer, or to levy a fine or suffer a recovery, and shall have refused or neglected to execute, make or transfer, or levy or suffer the same, and shall have been committed to prison under process for such contempt, or, being confined in prison for any other cause, shall have been charged with or detained under process for such contempt, and shall remain in such prison, the court may, upon motion or petition, and upon affidavit that such person has after the expiration of two calendar months from the time of his being committed under or charged with, or detained under such process, again refused to execute such deed or instrument or make such surrender or transfer, or levy or suffer such fine or recovery, order or appoint one of the masters in ordinary, or if the act is to be done out of London, then, if necessary, one of the masters extraordinary, to execute such deed or other instrument or to make such surrender or transfer, for and in the name of such person, and to levy such fine or suffer such recovery, in his name, and to do all acts necessary to give validity and operation to such fine and

³ Bl. Com. 412.

⁴ *Sharp v. Carter*, 3 P. Wms. 375, 379, n.; *Seton on Decrees* (4th ed.), 441, 1563.

⁵ *Lord Pelham v. Duchess of Newcastle*, 3 Swanst. 289, n.; *Seton on Decrees* (4th ed.), 1562.

⁶ *Seton on Decrees* (4th ed.), 1562.

⁷ *Terrell v. Allison*, 21 Wall. 289; *Howard v. Railway Co.*, 101 U. S. 837, 849; *Thompson v. Smith*, 1 Dill. 458.

⁸ *Farmers' L. & Tr. Co. v. Chicago & A. Ry. Co.*, 44 Fed. R. 653, 658. But see *Van Hook v. Throckmorton*, 8 Paige (N. Y.), 33; *People v. Grant*, 45 Cal. 97; *Stanley v. Sullivan*, 71 Wis. 585.

recovery, and to lead or declare the uses thereof: and the execution of the said deed or other instrument, and the surrender or transfer made by the said master, and the fine or recovery levied or suffered by him, shall in all respects have the same force and validity as if the same had been executed or made, levied or suffered, by the party himself; and within ten days after the execution or making of any such deed or other instrument or surrender or transfer, or levying or suffering such fine or recovery, notice thereof shall be given by the adverse solicitor to the party in whose name the same is executed or made; and such party, as soon as the deed or other instrument or surrender, transfer, fine or recovery shall be executed, made, levied, or suffered, shall be considered as having cleared his contempt, except as far as regards the payment of the costs of the contempt, and shall be entitled to be discharged therefrom, under any of the provisions of this act applicable to his case; and the court shall make such order as shall be just, touching the payment of the costs of or attending any such deed, surrender, instrument, transfer, fine, or recovery.”¹ “That where a person shall be committed for a contempt in not delivering to any person or persons or depositing in court or elsewhere, as by any order may be directed, books, papers, or any other articles or things, any sequestrator or sequestrators appointed under any commission of sequestration shall have the same power to seize and take such books, papers, writings, or other articles or things, being in the custody or power of the person against whom the sequestration issues, as they would over his own property; and thereupon such articles or things so seized and taken shall be dealt with by the court as shall be just; and after such seizure it shall be lawful for the court, upon the application of the prisoner, or of any other person in the cause or matter, or upon any report to be made in pursuance of this act, to make such order for the discharge of the prisoner, upon such terms, and, if it shall see fit, making any costs to the cause, as to the court shall seem proper.”² How far these acts will be followed by the Federal courts is a matter for future decision.³ The Supreme Court of the District of Columbia has power to appoint a trustee to exe-

§ 349. ¹ Acts of 1 Wm. IV. ch. 36, § 15, R. 15, passed in 1830. ² See Rule 90; *Shepherd v. Comm'rs of Ross County*, 7 Ohio, 271; *Carpenter*

³ Act of 1 Wm. IV. ch. 36, § 15, R. 16. *v. Strange*, 141 U. S. 787.

cute an assignment of a patent-right, if the defendant refuses to do so after a sale of the patent-right under a creditor's bill, and the decree for the sale may contain a provision for the appointment of the trustee in case of such refusal together with a direction that the defendant execute the assignment.⁴ A Circuit Court of the United States has power to direct its marshal to remove buildings from land over which a complainant has a right of way.⁵

§ 349 a. **Bills to carry Decrees into Execution.**—A bill to carry a decree into execution is proper where, after a decree has been pronounced, it has happened that owing to some neglect of the parties to proceed upon the decree, their rights have become so embarrassed by subsequent events that no ordinary process of the court upon the first decree will serve, and it is therefore necessary to have another decree of the court to ascertain and enforce them;¹ or where a person who was not a party nor claims under a party to the original decree, claims in a similar interest, or is unable to obtain the determination of his own right until the decree has been carried into execution;² or by or against a person claiming as assignee of a party to the original decree;³ or to carry into execution the judgment of an inferior court of equity.⁴ A bill of this description is generally partly an original bill, though not strictly original; and sometimes it is likewise a bill of revivor or a supplemental bill, or both: and the frame of the bill, and the course of proceedings upon it vary accordingly.⁵ Such a bill is treated as ancillary to the principal suit, and the Federal court in which the original decree was entered will take jurisdiction of the same irrespective of the citizenship of the parties.⁶ Upon a bill to carry a decree into execution the court is at liberty to examine into the grounds of the original decree, and if such decree appears to have been

⁴ *Ager v. Murray*, 105 U. S. 126, 132.

⁵ *Gornley v. Clark*, 34 U. S. 338.

§ 349 a. ¹ *Mitford's Pl. ch. i. § 3*; *Daniell's Ch. Pr. (1st Am. ed.) 1689*; *Johnson v. Northley*, *Prec. in Ch.* 134; s. c. 2 *Vernon*, 407.

² *Mitford's Pl. ch. i. § 3*; *Daniell's Ch. Pr. (1st Am. ed.) 1689-1690*; *Rylands v. Latouche*, 2 *Bligh*, 566; *Oldham v. Eboral*, *Cooper Sel. Cases, temp. Brougham*, 27.

³ *Lawrence Manufacturing Co. v. Janesville Cotton Mills*, 138 U. S. 552;

Organ v. Gardiner, 1 *Ch. Cases*, 231; *Lord Carteret v. Paschal*, 3 *Peere Williams*, 197; *Binks v. Binks*, 2 *Bligh P. C.* 593; *Daniell's Ch. Pr. (1st Am. ed.) 1691*.

⁴ *Morgan v. —*, 1 *Atk.* 408; *Mitford's Pl. ch. i. § 3*; *Daniell's Ch. Pr. (1st Am. ed.) 1691*.

⁵ *Mitford's Pl. ch. i. § 3*; *Daniell's Ch. Pr. (1st Am. ed.) 1693*.

⁶ *Railroad Companies v. Chamberlain*, 6 *Wall.* 748.

erroneous, to refuse to enforce it, even when the original decree was entered by consent.⁷ Where a decree is capable of being executed by the ordinary process and forms of the court, whatever the iniquity of the decree may be, till it is reversed the court is bound to assist it with the utmost process the course of the court will bear; but where the common process of the court will not serve, and things come to be in such a state and condition after a decree made, that it requires a new bill and a second decree upon that before the first decree can be executed; if the first decree is unjust, the court desires to be excused in making it its own, and to build upon such foundations, and charging its conscience with promoting an apparent injustice; and this obliges the court to examine the grounds of the first decree before it makes the same decree again.⁸

⁷ *Lawrence Manufacturing Co. v. Mitford's Pl. ch. i. § 3; Daniell's Ch. Pr. Janesville Mills*, 138 U. S. 552, 562; *Gay* (1st Am. ed.) 1691-1692.

v. Parprat, 106 U. S. 679; *Lawrence v. Berney*, 2 Rep. in Ch. 127. *Johnson v. Lawrence Manufacturing Co. v. Janesville Mills*, 138 U. S. 552, 562; *Mitford's Pl. ch. i. § 3; Daniell's Ch. Pr.* (1st Am. ed.) 1691-1692.

Northy, Prec. in Ch. 134; s. c. 2 *Vernon*, 407; *Attorney-General v. Day*, 1 *Vesey*, 218; *Wert v. Skip*, 1 *Vesey*, 218; *Hamilton v. Houghton*, 2 *Bligh P. C.* 169;

CHAPTER XXVII.

CORRECTION OF DECREE OTHERWISE THAN BY APPEAL.

§ 350. **Correction of Decrees in General.** — When a party to a suit in equity, or his representative, feels himself aggrieved by a final decree of the court, there are eight ways in which he can apply to have such decree reversed, set aside, or varied: by petition for a mere clerical or accidental error,¹ by a petition for a rehearing,² by a bill of review,³ by a bill in the nature of a bill of review,⁴ by a supplemental bill in the nature of a bill of review,⁵ by a bill to set aside a decree on account of fraud, mistake, accident, or surprise,⁶ by a bill to suspend or avoid the operation of a decree,⁷ and by an appeal.⁸ An interlocutory decree can be corrected at the entry of the final decree.⁹

§ 351. **Amendment upon Petition without a Rehearing.** — The rules provide that “clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrolment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.”¹ Decretal orders may be corrected in the same manner.² In this way, corrections have been permitted of errors in the title of a decree or order;³ of an omission in a decree for specific performance of a direction to settle the conveyance,⁴ or of a reference as to title;⁵ of an omission in a decree in a creditor's suit of a direction to take the accounts of the personal estate;⁶ and of other defects or redundancies in respect to which a decree did not conform to the directions of the

§ 350. ¹ § 351.

² § 352.

³ §§ 354–356.

⁴ § 357.

⁵ § 353.

⁶ § 358.

⁷ § 359.

⁸ Chapter XXX.

⁹ *Henry v. Travelers' Ins. Co.*, 34 Fed. R. 258; *Clark v. Blair*, 14 Fed. R. 812.

§ 351. ¹ Rule 85. See *Witters v. Sowles*, 32 Fed. R. 130; *Hop Bitters Manuf. Co. v. Warner*, 28 Fed. R. 577.

² *Union Sugar Refinery v. Mathiesson*, 3 Cliff. 146.

³ *Spearing v. Lynn*, 2 Vern. 376.

⁴ *Trevelyan v. Charter*, 9 Beav. 140.

⁵ *Hughes v. Jones*, 25 Beav. 24.

⁶ *Pickard v. Mattheson*, 7 Ves. 293.

written opinion of the court.⁷ An order or decree entered by consent cannot be varied or modified in a material part without the assent of all the parties to the same; but the court, it seems, may give such further directions as are necessary to carry it "into effect, according to its spirit and intent."⁸ The former English practice occasionally though rarely allowed similar corrections in what were manifestly mere clerical errors after a decree had been enrolled;⁹ and in one case in the Federal courts, it has been said that an error in calculating the amount ordered by the decree to be paid may be corrected after enrolment, upon motion or petition, by entering a credit as for its payment.¹⁰

§ 352. *Petitions for a Rehearing.* — A petition for a rehearing is the proper method of correcting before enrolment errors in a decree which are not evidently clerical or accidental. A petition for a rehearing could formerly in England have only been made to a judge before whom the cause was heard, or to the Lord Chancellor.¹ In the Federal courts a petition for a rehearing will usually be entertained only by the judge or justice before whom the cause was heard.² The rules provide that "No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court."³ Whether a petition filed within the time prescribed by the rules may be heard and granted subsequently is unsettled.⁴ A

⁷ *Gage v. Kellogg*, 26 Fed. R. 242; *Rogers v. Riessner*, 34 Fed. R. 270; *Tufts v. Tufts*, 3 W. & M. 429; *Pfanschmidt v. Kelly Mercantile Co.*, 32 Fed. R. 667; *Witters v. Sowles*, 32 Fed. R. 765; *Burd-sall v. Curran*, 31 Fed. R. 918; *Albany v. Steam Trap Co.*, 26 Fed. R. 318; *Dor-sheimer v. Rorback*, 9 C. E. Green (N. J.), 33; *Sprague v. Jones*, 9 Paige (N. Y.), 395; *Jarmon v. Wiswall*, 9 C. E. Green (N. J.), 68. But see *R'y Reg. Manuf. Co. v. No. Hudson Co. R. Co.*, 26 Fed. R. 411.

⁸ *Chancellor Walworth in Leitch v. Cumpston*, 4 Paige (N. Y.), 476; *Gage v. Kellogg*, 26 Fed. R. 242; *Rogers v. Riessner*, 34 Fed. R. 270.

⁹ *Weston v. Haggerston, G. Cooper*, 134; *Yow v. Townsend*, 1 Dickens, 59; *Attorney-General v. Greenhill*, 34 Beav.

174; *Beekman v. Peck*, 3 J. Ch. (N. Y.) 415; *Clark v. Hall*, 7 Paige (N. Y.), 382; *Thompson v. Goulding*, 5 Allen (Mass.), 81.

¹⁰ *Massie v. Graham*, 3 McLean, 41.

§ 352. ¹ *Daniell's Ch. Pr.* (5th Am. ed.) 1471.

² *Giant Powder Co. v. California Vig-orit Powder Co.*, 5 Fed. R. 197, 202.

³ Rule 88. See *McMicken v. Perrin*, 18 How. 507; *Bank of Lewisburg v. Shef-fey*, 140 U. S. 145.

⁴ In *Glenn v. Noonan*, 43 Fed. R. 403; s. c. 43 Fed. R. 550, Judge Thayer held that it cannot. *Contra* is a *dictum* of Mr. Justice Field in *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. R. 197, 202. See *Clarke v. Threlkeld*, 2 Cranch C. C. 408.

rehearing in England was formerly allowed almost as of course, upon the filing of a petition signed by two counsel, of whom one at least must have been concerned in the original hearing; the rule having been stated by Lord Hardwicke, that "such credit is given by the court to their opinion that the cause ought to be reheard, that it will in general, order the cause to be set down" for that purpose, as a matter of course.⁵ This rule, however, has not been adopted in the courts of the United States, where a rehearing is discretionary with the judge to whom the application is made.⁶ Unless the judge acts of his own motion, a rehearing will be granted only for errors of law apparent upon the record and arising upon questions which were not argued at the original hearing, or upon newly discovered evidence of such a character that it would have authorized a new trial in an action at law.⁷ "A rehearing should not be granted for newly discovered evidence where the evidence could have been obtained by reasonable diligence on the first hearing, nor when it is merely cumulative to that previously received, nor when, if presented, it would not have changed the result."⁸ "A new hearing should not be had simply to allow a rehash of old arguments."⁹ "If rehearings are to be had, until the counsel on both sides are entirely satisfied, I fear, that suits would become immortal, and the decision be postponed indefinitely."¹⁰ A rehearing can only take place for the purpose of altering a decree upon grounds which existed at the time when the decree was pronounced, and will not be allowed to remedy a grievance consequent upon a decree resulting entirely from circumstances that have occurred subsequent to its entry.¹¹ The rules provide that "every petition for a rehearing shall contain the special matter or

⁵ *Cunyngham v. Cunyngham*, Ambler, 89. See *Attorney General v. Brooke*, 18 Ves. 319, 325; *East India Co. v. Boddam*, 13 Ves. 421.

⁶ Mr. Justice Field in *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. R. 97.

⁷ *Daniel v. Mitchell*, 1 Story, 198; *Jenkins v. Eldredge*, 3 Story, 299; *Emerson v. Davies*, 1 W. & M. 21; *Tufts v. Tufts*, 3 W. & M. 426; *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. R. 197.

⁸ *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. R. 197, 201; *Jenkins v. Eldredge*, 3 Story, 299; *Tufts v.*

Tufts, 3 W. & M. 426; *Hicks v. Otto*, 22 Blatchf. 122; *Page v. Holmes Burglar Alarm Telegraph Co.*, 2 Fed. R. 330; *The Collins Co. v. Coes*, 8 Fed. R. 517; *Witeters v. Sowles*, 31 Fed. R. 5; *Pfanschmidt v. Kelly Mercantile Co.*, 32 Fed. R. 667, and cases cited in the opinions in these cases. But see *Webster Loom Co. v. Higgins*, 43 Fed. R. 673.

⁹ Mr. Justice Field in *Giant Powder Co. v. California Vigorit Powder Co.*, 5 Fed. R. 197, 201.

¹⁰ Mr. Justice Story in *Jenkins v. Eldredge*, 3 Story, 299, 305.

¹¹ *Bowyer v. Bright*, 13 Price, 316; *Hurlburd v. Freeloove*, 3 Wis. 537.

cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person."¹² The allegations must be full, precise, and certain. It seems that they will be insufficient if sworn to merely upon information and belief.¹³ It has been held that when evidence of new facts not already in issue is to be given, the petition should be accompanied by a supplemental bill in the nature of a bill of review, pleading these facts; in which case, if the petition be granted, the hearing upon that bill will take place at the same time as the rehearing of the original suit.¹⁴ The usual proceedings to obtain a rehearing are for the party desiring it to file his petition in the clerk's office, and then to procure an order directing his opponent to show cause why his prayer should not be granted.¹⁵ The adverse party may then answer, controverting or setting up new matter in avoidance of allegations in the petition; or probably may show cause against granting the rehearing on the return day of the order by an affidavit.¹⁶ If there be any irregularity in the petition, it may be taken off the file at the respondent's motion.¹⁷ Upon the return day of the order to show cause, if no adjournment be had, the matter is argued before the judge, by whose direction the decree or order complained of was made, unless he be absent, when the papers and the briefs of counsel should be filed with the clerk, who will mail them to him.¹⁸ The petition will not be granted without notice to the adverse parties, and an opportunity for their presence afforded them.¹⁹ A rule of the Circuit Court for the Southern District of New York provides that when a "motion for a rehearing is made during the term at which a decree has been rendered, the enrolling or recording of such decree shall be suspended until the final disposition of such motion by the court."²⁰ Upon a rehearing the cause or matter is proceeded in as if it were heard for the first time. All depositions taken before

¹² Rule 88.

¹³ *Page v. Holmes Burglar Alarm Telegraph Co.*, 2 Fed. R. 330.

¹⁴ *Baker v. Whiting*, 1 Story, 218; *Perry v. Phelps*, 17 Ves. 173, 178; *Head v. Godlee, Johns*, 536, 579; *Jopp v. Wood*, 2 De G. J. & S. 323.

¹⁵ *Giant Powder Co. v. California Vigor Powder Co.*, 5 Fed. R. 197.

¹⁶ *Giant Powder Co. v. California Vigor Powder Co.*, 5 Fed. R. 197.

¹⁷ *Wood v. Griffith*, 1 Meriv. 35.

¹⁸ *Giant Powder Co. v. California Vigor Powder Co.*, 5 Fed. R. 195.

¹⁹ *Giant Powder Co. v. California Vigor Powder Co.*, 5 Fed. R. 197.

²⁰ U. S. C. C., S. D. N. Y., Rule 114.

the original hearing, though not then used, may be read,²¹ and the plaintiff may withdraw from evidence any portion of the answer read before.²² No new evidence can be used, unless a supplemental bill has been filed;²³ but exhibits not previously used may be produced;²⁴ and if a witness has since the former hearing been convicted of perjury,²⁵ or admitted receiving a bribe to influence his testimony,²⁶ that may be proved to the court. After one rehearing, a petition for another can only be filed by special leave of the court, and may be taken off the file if presented without such leave.²⁷ It has been held that an order granting a rehearing after the time prescribed by the rules has expired is void, not merely voidable; and that a party does not by taking a subsequent step in the cause, waive his right to move to vacate the same.²⁸ The grant or refusal, absolute or conditional, of an application for a rehearing, which has been made in due time, rests in the discretion of the court where the cause is first heard, and is not a subject of appeal.²⁹

§ 353. **Supplemental Bills in the nature of Bills of Review.** — A supplemental bill in the nature of a bill of review is a bill that brings to the attention of the court new matter, which has arisen or been discovered since, and could not by the exercise of due diligence have been discovered before, the time for taking testimony in a cause expired, and which the party filing the bill alleges as a reason why a decree made and passed therein, but not signed and enrolled, should be reversed or modified.¹ Such a bill cannot be filed after a decree has been signed and enrolled.² The proper remedy in a similar case then is a bill of review.³ A supplemental bill in the nature of a bill of review cannot be used to obtain a reversal or modification of a decree for errors in law apparent upon its face.⁴ That, before enrolment, can only be done by means of a petition for a rehearing.⁵ Matter of revivor and supplement may

²¹ *Cunyngham v. Cunyngham*, Ambler, 89, 90.

²² *Allfrey v. Allfrey*, 1 Macn. & G. 87; *Ogle v. Morgan*, 1 De G. M. & G. 359.

²³ *Jenkins v. Eldredge*, 3 Story, 299.

²⁴ *Herring v. Clobery*, Cr. & Ph. 251.

²⁵ *Needham v. Smith*, 2 Vern. 463.

²⁶ *Needham v. Smith*, 2 Vern. 463.

²⁷ *Moss v. Baldock*, 1 Phill. 118.

²⁸ *Glenn v. Lucas*, 43 Fed. R. 550.

²⁹ *Roemer v. Bernheim*, 132 U. S. 103, 106; *Bullington v. Harvey*, 95 U. S. 99,

100; *Steines v. Franklin County*, 14 Wall. 15, 22; *Railway Company v. Heck*, 102 U. S. 120; *Kennon v. Gilmer*, 131 U. S. 22, 24; *Boesch v. Gräff*, 133 U. S. 697, 699.

§ 353. ¹ *Perry v. Phelps*, 17 Ves. 173; *Mitford's Pl. ch. 1*, § 2; *Moore v. Moore*, 2 Ves. Sen. 596; *Story's Eq. Pl.* §§ 422, 423.

² *Beames' Orders*, 1.

³ See §§ 354-356.

⁴ *Perry v. Phelps*, 17 Ves. 173.

⁵ See § 352.

be incorporated in such a supplemental bill.⁶ An English chancery order made on the 17th of October, 1841, and which should probably be followed here, the clerk taking the place of the registrar and five dollars being reckoned as a pound sterling, provides : "That no supplemental bill, or bill in the nature of a bill of review, grounded upon new matter discovered, or pretended to be discovered, since the pronouncing of any decree of this Court, in order to the reversing or varying of such decree, shall be exhibited without the special leave of the Court first obtained for that purpose, and unless the party exhibiting the same do first deposit with the registrar of this Court so much money as together with the deposit by the rules of this Court required to be made on obtaining a rehearing of the cause or causes wherein such decree was pronounced will make up the sum of 50*l.*, as a pledge to answer such costs and damages as shall be awarded to the adverse party, in case the court shall think fit to award any at the hearing of the cause on such supplemental or new bill."⁷ A supplemental bill in the nature of a bill of review should state the facts which it is desired to prove, and, if they had then occurred, the reason why they were not discovered and given in evidence before publication, and it seems should state positively that the decree has not been enrolled, and not in the alternative, praying one sort of relief as upon a bill of review, if the decree has been enrolled, and if not enrolled, then to have the benefit of it as upon a supplemental bill in the nature of a bill of review.⁸ Such a bill should conclude with a prayer that the cause may be reheard. It should be signed by counsel, and in other respects conform to the requirements of a bill of review upon newly discovered facts.⁹ Like that, it can only be filed by leave of the court, which is obtained in the same way, and upon the same grounds as that to file such a bill of review ;¹⁰ and the proceedings upon the two kinds of bills are also substantially the same.¹¹ But according to Lord Redesdale, "Bills in the nature of bills of review do not appear subject to any peculiar cause of demurrer, unless the decree sought to be reversed does not affect the interest of the person filing the bill."¹²

⁶ *Perry v. Phelps*, 17 Ves. 176-178.

⁹ *Story's Eq. Pl.* §§ 422, 425. See *infra*,

⁷ Order of 17th October, 1741; *Beames' Orders*, 368.

§ 355.

¹⁰ *Story's Eq. Pl.* § 422.

⁸ *Story's Eq. Pl.* § 425. See the language of Lord Eldon in *Perry v. Phelps*,

¹¹ *Story's Eq. Pl.* §§ 422-425.

17 Ves. 173-178.

¹² *Mitford's Pl. ch.* 1, § 3, pt. 3.

Laches may be a ground for refusing leave to file a supplemental bill in the nature of a bill of review, unless such laches is extenuated by laches on the part of the defendant to it.¹³ Such a bill cannot be heard unless accompanied by a petition for a rehearing, when the rehearing of the original and the hearing of the supplemental cause will be set down together.¹⁴

§ 354. **Bills of Review.**—A bill of review is a bill filed to reverse or modify a decree that has been signed and enrolled for error in law apparent upon the face of such decree, or on account of new facts discovered since publication was passed in the original cause, and which could not by the exercise of due diligence have been discovered or used before the decree was made.¹ A bill of review can only be filed to impeach a final, not to impeach an interlocutory decree.² For an interlocutory decree can always be modified or reversed by the court without any bill for that purpose.³ But the expression “final decree” is here used with the meaning given it when speaking of appeals.⁴ The errors of law for which a decree may be reversed or modified must be clearly apparent upon the record, that is, “only such as arose upon the pleadings, proceedings, and decree, without reference to the evidence in the cause;”⁵ as, for example, the disregard of a statute,⁶ or want of jurisdiction,⁷ or the finding of a fact contrary to an allegation in a defendant’s answer when no evidence was taken;⁸ not errors in drawing conclusions from evidence,⁹ nor errors in casting accounts,¹⁰ nor it seems in matters of abatement,¹¹ nor in the

¹³ Story’s Eq. Pl. § 423; Sheffield Canal Co. v. Sheffield & R. Ry. Co., 1 Phillips, 484.

¹⁴ Moore v. Moore, 2 Ves. Sen. 596, 598; Perry v. Phelps, 17 Ves. 173.

§ 354. ¹ Mitford’s Pl. ch. 1, § 3, pt. 3; Story’s Eq. Pl. §§ 403–420; Irwin v. Meyrose, 7 Fed. R. 533; Nickle v. Stuart, 111 U. S. 776.

² Jenkins v. Eldredge, 3 Story, 299; Story’s Eq. Pl. § 408 a.

³ Story’s Eq. Pl. § 408 a. See *supra*, § 203.

⁴ Story’s Eq. Pl. § 408 a; Whiting v. Bank of United States, 13 Pet. 6, 15; Ray v. Law, 3 Cranch, 179; Jenkins v. Eldredge, 3 Story, 299.

⁶ Mr. Justice Bradley in Buffington v. Harvey, 95 U. S. 99. See also Whiting

v. Bank of United States, 13 Pet. 6; Putnam v. Day, 22 Wall. 60; Thompson v. Maxwell, 95 U. S. 391.

⁶ Story’s Eq. Pl. § 405; Gregor v. Molesworth, 2 Ves. Sen. 109.

⁷ Ketchum v. Farmers’ L. & T. Co., 4 McLean, 1.

⁸ Clark v. Killian, 103 U. S. 766.

⁹ Whiting v. Bank of United States, 13 Pet. 6; Dexter v. Arnold, 5 Mason, 303; Putnam v. Day, 22 Wall. 60; Buffington v. Harvey, 95 U. S. 99; Kimberley v. Arms, 40 Fed. R. 548; s. c. 136 U. S. 629.

¹⁰ Massie v. Graham, 3 McLean, 41; Beames’ Ord. 1; Story’s Eq. Pl. § 405.

¹¹ Story’s Eq. Pl. § 411; Hartwell v. Townsend, 6 Bro. Parl. R. 107; Slingsby v. Hale, 1 Ch. Cas. 122.

exercise of discretion,¹² nor matters of form,¹³ — among which, however, the omission of a clause giving an infant defendant a day in which to show cause against a decree is not included, and on that ground a bill of review may be sustained.¹⁴ It has been held to be no sufficient ground for a bill of review that since the decree a State court has given to the Constitution of the State a construction different from that put upon it by the Federal court in its decree;¹⁵ nor that since the decree the Supreme Court has changed its ruling upon a question of law or fact.¹⁶ In England, where the mandatory part of a decree was usually preceded by a statement of the facts upon which it was founded, only the decree itself could be examined for such errors;¹⁷ but in the Federal courts where this custom does not exist, the whole record except the evidence may be thus corrected.¹⁸ Bills of review for errors apparent upon the record can only be filed within the time limited for an appeal.¹⁹ The time within which the control of the Circuit Court over the case is suspended by an appeal subsequently dismissed, is not included in the computation of time;²⁰ but not the period between the entry of a void order vacating the order sought to be reviewed and the vacation of such void order.²¹ Laches for a shorter period of time might be a ground for dismissing a bill of review.²² After a decree has been affirmed by the appellate court, it cannot be reviewed for any reason without the leave of that court;²³ and leave will rarely, if ever, be granted them to file a bill of review for errors in law.²⁴ Leave of court is not needed to enable a party to file a bill of review for errors apparent upon

¹² *Buffington v. Harvey*, 95 U. S. 99; *Irwin v. Meyrose*, 7 Fed. R. 533.

¹³ *Story's Eq. Pl.* § 411.

¹⁴ *Story's Eq. Pl.* § 407; *Perry v. Phelps*, 17 Ves. 173; *Gregor v. Molesworth*, 2 Vesey, Sen. 109. See *supra*, § 322.

¹⁵ *King v. Dundee Mortgage & Tr. I. Co.*, 28 Fed. R. 33. *Contra*, *Knox v. Columbia Liberty Iron Co.*, 42 Fed. R. 378.

¹⁶ *Tilghman v. Werk*, 39 Fed. R. 680.

¹⁷ *Story's Eq. Pl.* § 407.

¹⁸ *Whiting v. Bank of United States*, 13 Pet. 6; *Buffington v. Harvey*, 95 U. S. 99; *Clark v. Killian*, 103 U. S. 766.

¹⁹ *Thomas v. Harvie's Heirs*, 10 Wheat. 146; *Kennedy v. Georgia State Bank*, 671; *Story's Eq. Pl.* § 408.

How. 586; *Clark v. Killian*, 103 U. S. 766; *Story's Eq. Pl.* § 410. See also *Massie v. Graham*, 8 McLean, 41; *McDonald v. Whitney*, 39 Fed. R. 406.

²⁰ *Ensminger v. Powers*, 108 U. S. 292.

²¹ *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207.

²² *Farmers' Loan & Trust Co. v. Green Bay & M. R. Co.*, 16 Fed. R. 100, 113.

²³ *Southard v. Russell*, 16 How. 547; *Kingsbury v. Buckner*, 134 U. S. 654; *Kimberly v. Arms*, 40 Fed. R. 548; s. c. 136 U. S. 629; *Story's Equity Pleading*, § 408.

²⁴ *Southard v. Russell*, 16 How. 547; *Kingsbury v. Buckner*, 134 U. S. 650, 671; *Story's Eq. Pl.* § 408.

the face of the record.²⁵ A bill defective as a bill of review may be sustained as a cross-bill.²⁶

§ 355. **Provisions peculiar to Bills of Review for Matters of Fact newly discovered.** — Bills of review upon matters of fact newly discovered can only be filed by express leave of the court.¹ Leave should be obtained by a petition praying for leave to file the bill, and supported by an affidavit showing that the new matter, which it is desired to prove, was not known to the petitioner, and could not have been discovered by him, with the exercise of due diligence, in time to prove it before the entry of the decree sought to be reviewed.² It seems that the affidavit must be positive, and not merely upon information and belief.³ Previous knowledge of it by the petitioner's attorney or other agent while acting in that capacity, is equivalent to knowledge by the petitioner, and will be a reason for refusing to allow him to file the bill.⁴ If the newly discovered facts are proved by documents that were under the control of the petitioner, very good reasons for his not discovering and producing them before must be shown in order to entitle him to file a bill of review founded upon them.⁵ The affidavit should also state the nature of the new matter, and the evidence desired to be given in its support, in order that the court may judge of its relevancy and materiality.⁶ It is said that the matter must be not only new, but material, and such as, if unanswered in point of fact, would clearly entitle the plaintiff to a decree, or would raise a question of so much nicety and difficulty as to be a fit subject of judgment in the cause.⁷ The new matter may be concerning a point not in issue in the original cause,⁸ provided that it be connected with the subject-matter of the bill.⁹ A bill of review will not lie on the ground of newly

²⁵ *Ross v. Prentiss*, 4 McLean, 106.

²⁶ *Houghton v. West*, 2 Bro. Parl. Rep. by Tomlins, 88; *Story's Eq. Pl.* § 401, n. 5.

§ 355. ¹ *Anon.*, 2 P. Wms. 283; *Perry v. Phelps*, 17 Ves. 173; *Ross v. Prentiss*, 4 McLean, 106; *Story's Eq. Pl.* § 412.

² *Wortley v. Birkhead*, 2 Ves. Sen. 571; *Young v. Keighly*, 16 Ves. 348; *Purcell v. Miner*, 4 Wall. 519; *Dexter v. Arnold*, 5 Mason, 303; *Massie v. Graham*, 3 McLean, 41; *Ross v. Prentiss*, 4 McLean, 106; *Story's Eq. Pl.* §§ 412, 413.

³ *Page v. Holmes Burglar Alarm Telegraph Co.*, 2 Fed. R. 330.

⁴ *Norris v. Le Neve*, 3 Atk. 26; *Greenlee v. McDowell*, 4 Ired. Eq. (S. C.) 481; *Story's Eq. Pl.* §§ 413, 414.

⁵ *Forum Romanum*, 187.

⁶ *U. S. v. Sampeyreac*, Hempst. 118; *Dexter v. Arnold*, 5 Mason, 303; *Massie v. Graham*, 3 McLean, 41; *Story's Eq. Pl.* § 412.

⁷ *Ord v. Noel*, 6 Madd. 127.

⁸ *Partridge v. Osborne*, 6 Russ. 195.

⁹ *U. S. v. Sampeyreac*, Hempst. 118.

discovered evidence which is merely cumulative, or goes to impeach the character of witnesses.¹⁰ It has been held that a bill of review will not lie on the ground that a decree offered in evidence in the original suit and there held to be *res adjudicata* has since been set aside for want of jurisdiction, unless it is shown that the defect in the jurisdiction could not have been known or discovered by the exercise of reasonable diligence when the decree was offered in evidence.¹¹ It has been said that the matter upon the discovery of which a bill of review is based, if previously known to the other party, must be of such a nature that he was not in conscience obliged to have discovered it to the court; for if it was known to him and such as in conscience he ought to have discovered, he obtained the decree by fraud, and it ought to be set aside by an original bill.¹² Permission to file such a bill of review is always in the discretion of the court;¹³ and lapse of time since the discovery of the new matter will always have great weight in inducing the court to look with disfavor upon an application for leave to file such a bill of review.¹⁴ It has been said that if the decree impeached has been affirmed by an appellate court, such a bill of review can only be filed by leave of that court.¹⁵ A bill of review for newly discovered matter, if filed without leave, may upon motion be dismissed or taken off the file.¹⁶

§ 356. Provisions common to all Bills of Review. — “To entitle a person to bring a bill of review, it is necessary that he should have obeyed or performed the decree; as, if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone. But if any act be decreed to be done, which extinguisheth the party’s right at the common law, as making of assurance or release, acknowledging satisfaction, cancelling bonds or evidences, and the like, those parts of the decree are to be spared until the

¹⁰ Southard v. Russell, 16 How. 547.

¹¹ Vetterlein v. Barker, 45 Fed. R. 741.

¹² Manaton v. Molesworth, 1 Eden, 18,

25. But see U. S. v. Sampeyreac, Hempst. 118; s. c. as Sampeyreac v. U. S., 7 Pet. 222.

¹³ Beames’ Orders, 1; Massie v. Graham, 3 McLean, 41; Story’s Eq. Pl. §§ 404, 417.

¹⁴ Blandy v. Griffith, 6 Fish. Pat. Cas.

434; Thomas v. Harvie, 10 Wheat. 146, 151; Tilghman v. Werk, 39 Fed. R. 680; Story’s Eq. Pl. § 419.

¹⁵ Southard v. Russell, 16 How. 547.

¹⁶ Carroll v. Parran, 1 Bland (Md.), 125, note.

bill of review be determined; but such sparing is to be warranted by public order made in court."¹ If, however, the plaintiff to the bill of review be insolvent,² or for any other reason it be impossible for him to obey the original decree;³ or if it directed him to perform an act after the performance of another act by the other party, and that other have omitted to perform his part thereof;⁴ or perhaps, if he have given security for its performance,⁵—his disobedience is no objection to the bill of review. By an English order in Chancery, made on March 12, 1700, it was ordered that for the future no bill of review should be allowed or admitted unless the party who preferred it first deposited the sum of £50 with the registrar of the court, as a pledge to answer such costs and damages as the court should award to the adverse party, in case it should think fit to dismiss the bill of review.⁶ This order should probably be followed here, five dollars being reckoned as the equivalent of a pound sterling, and the money being deposited with the clerk of the court.⁷ The court may, however, dispense with this requirement.⁸ A decree entered by consent cannot be impeached by a bill of review.⁹ A decree entered by consent can be set aside only by an original bill alleging fraud or surprise.¹⁰ It is no objection to a bill of review that the party filing it has entered and procured the enrolment of the decree; "because," said Lord Nottingham, "he can have no error till it be enrolled, and perhaps the defendant will never enroll it;"¹¹ and a party may file a bill of review to a decree entirely in his favor, claiming that it is less beneficial to him than it should have been.¹² If upon a bill of review a former decree has been reversed, another bill of review may be brought to reverse the decree of reversal;¹³ but after a bill of review has been dismissed

§ 353. ¹ Daniell's Ch. Pr. (3d Am. ed.) 1644-1655. See also Beames' Orders, 4; *Massie v. Graham*, 3 McLean, 41. This rule applies even when it appears on the face of the former decree that the court had no jurisdiction of the subject-matter. *Miller v. Clark*, 47 Fed. R. 850.

² *Davis v. Speiden*, 104 U. S. 83.

³ *Story's Eq. Pl.* § 496; *Wiser v. Bloddy*, 2 J. Ch. (N. Y.) 488; *Davis v. Speiden*, 104 U. S. 83.

⁴ *Partridge v. Osborne*, 5 Russ. 195, 251; *Story's Eq. Pl.* § 495.

⁵ *Stallings v. Goodloe*, 3 Murphey,

159; *Taylor v. Person*, 2 Hawks (N. C.), 278.

⁶ Beames' Orders, 313; *Anon.*, 2 P. Wms. 283.

⁷ *Davis v. Speiden*, 104 U. S. 83.

⁸ *Davis v. Speiden*, 104 U. S. 83.

⁹ *Thompson v. Maxwell*, 95 U. S. 391.

¹⁰ *Gilbert v. Endean*, 9 Ch. D. 259, 266.

See *infra* § 355.

¹¹ *Cook v. Bamfield*, 3 Swanst. 607.

¹² *Cook v. Bamfield*, 3 Swanst. 607; *Dexter v. Arnold*, 5 Mason, 303.

¹³ *Mitford Pl. ch. 1*, § 3; *Stafford v. Bryan*, 2 Page (N. Y.), 45.

upon demurrer or otherwise, no second bill of review will be allowed to be filed.¹⁴ It has been held that a bill of review cannot be filed pending an appeal, although the plaintiff alleges that he does not intend to perfect his appeal.¹⁵ No person can file a bill of review except a party who has been aggrieved by the decree complained of,¹⁶ or the assignee by operation of law of such a party.¹⁷ All the parties to the original decree should be joined either as plaintiffs or as defendants to the bill of review.¹⁸ Lord Redesdale gives the following rules for the framing of a bill of review: "In a bill of this nature it is necessary to state the former bill, and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it; and the ground of law, or new matter discovered upon which he seeks to impeach it; and if the decree is impeached on the latter ground, it seems necessary to state in the bill the leave obtained to file it and the fact of the discovery, though it may be doubted whether after leave given to file the bill that fact is traversable.¹⁹ The bill may pray simply that the decree may be reviewed and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the bill may also pray the farther decree of the court, to put the party complaining of the former decree into the situation in which he would have been if that decree had not been executed. If the bill is brought to review the reversal of a former decree, it may pray that the original decree may stand. The bill may also, if the original suit has become abated, be at the same time a bill of revivor. A supplemental bill may likewise be added, if any event has happened which requires it; and particularly if any person not a party in the original suit becomes interested in the subject he must be made a party to the bill of review by way of supplement."²⁰ The plaintiff, however, cannot put his case in the alter-

¹⁴ *Pitt v. Earl of Arglass*, 1 Vern. 441; *Dunby v. Filmore*, 1 Vern. 135.

¹⁵ *Kimberly v. Arms*, 40 Fed. R. 545, 550; s. c. 136 U. S. 629; *William v. William*, 16 Ves. 72, 87.

¹⁶ *Whiting v. Bank of the United States*, 13 Pet. 6; *Thompson v. Maxwell*, 95 U. S. 391. But see *King v. Dundee Mortgage & Tr. I. Co.*, 28 Fed. R. 33.

¹⁷ *Story's Eq. Pl.* § 409; *Thompson v. Maxwell*, 95 U. S. 391.

¹⁸ *Bank of the United States v. White*, 8 Pet. 262.

¹⁹ But see *United States v. Sampeyreac*, Hempst. 118; *Dexter v. Arnold*, 5 Mason, 303; *Story's Eq. Pl.* § 420, note 7.

²⁰ *Mitford's Pl. ch. 1*, § 3, pt. 3. See also *Whiting v. Bank of United States*, 13 Pet. 6.

native, as a bill of review, or, if the court shall think it not good as such, then as a bill of revivor and supplement.²¹ It is improper for a bill of review on account of errors of law to contain a statement of the evidence in the original cause.²² A bill of review which seeks relief because the original decree was erroneous for errors of law appearing on its face, and because of the discovery of new facts, and because of fraud, has been held multifarious.²³ A bill of review should be signed by counsel, and otherwise conform in general to the requirements of an original bill.²⁴ If the court had jurisdiction of the original suit, it can take jurisdiction of the bill of review, even though it would have none were the latter regarded as the beginning of a new suit.²⁵ It has been said that a Federal court cannot take cognizance of a bill of review to a decree of a State court.²⁶ The service and the appearance of a defendant to a bill of review is made and enforced in the same manner as to an original bill. But if the defendant be beyond the jurisdiction of the court, service of a subpœna upon his solicitor in the former suit may be allowed by the court.²⁷ The usual defense to a bill of review for errors apparent upon the face of the decree is by demurrer;²⁸ to which is usually joined a plea setting forth in full the original decree, although there seems to be no necessity for this practice.²⁹ If the demurrer is overruled, the decree is reversed or modified and the errors allowed, and no further answer or hearing is necessary.³⁰ If the demurrer is sustained, that has all the effect of confirming the decree, and puts an end to the suit.³¹ The rule is in such a case only to vary the decree upon such errors as are complained of, except as to consequential directions, which will be altered to conform to the changes made.³² If a bill of review for apparent error contain a statement of the evidence taken in the original cause, that may be stricken out of the bill as surplusage on motion;³³ or it may be a ground of demurrer, if specially assigned;³⁴ but the bill, if other-

²¹ *Perry v. Phelps*, 17 Ves. 173.

²² *Buffington v. Harvey*, 95 U. S. 99.

²³ *Kimberly v. Arms*, 40 Fed. R. 548, 559; s. c. 136 U. S. 629.

²⁴ *Mitford's Pl. ch. 1, § 2, pt. 3.*

²⁵ *Oglesby v. Attrill*, 12 Fed. R. 227.

See § 21.

²⁶ *Mr. Justice Bradley in Barrow v. Hunton*, 99 U. S. 80, 83.

²⁷ See *supra*, § 96.

²⁸ *Mitford's Pl. ch. 2, § 2, pt. 1, 5.*

²⁹ *Mitford's Pl. ch. 2, § 2, pt. 1, 5.*

³⁰ *Cook v. Bamfield*, 3 Swanst. 607.

³¹ *Webb v. Pell*, 3 Paige (N. Y.), 368.

³² *Moore v. Moore*, 2 Ves. Sen. 596, 598.

³³ *Mr. Justice Bradley in Buffington v. Harvey*, 95 U. S. 99.

³⁴ *Buffington v. Harvey*, 95 U. S. 99.

wise good, cannot be dismissed for that reason upon a general demurrer,³⁵ although such evidence or an allegation of an error of fact cannot on a general demurrer be used in support of the bill.³⁶ According to Lord Redesdale: "When any matter beyond the decree is to be offered against opening the enrolment, as length of time, that matter must be pleaded; otherwise the plaintiff will not have the benefit of exceptions, as infancy, coverture, or the like."³⁷ "A bill of review upon the discovery of new matter and a supplemental bill of the same nature being exhibited only by leave of the court, the ground of the bill is generally well considered before it is brought; and therefore in point of substance it can rarely be liable to a demurrer. But if brought upon new matter, and the defendant should think that matter not relevant, probably he might take advantage of it by way of demurrer, although the relevancy ought to be considered at the time leave is given to bring the bill."³⁸ If a demurrer to such a bill of review or supplemental bill be overruled, it does not dispose of the cause; and the defendant must answer, because fact is at issue.³⁹ If the demurrer is allowed, however, the suit is at an end.⁴⁰ The defendant may, it seems, traverse, and attempt to disprove, the allegations concerning the discovery of the new facts.⁴¹ Upon the argument of the demurrer, nothing can be read except the bill of review and the decree,⁴² and, in the Federal courts, the record⁴³ in the original suit; but, after the demurrer has been overruled, the plaintiff is at liberty to read any evidence that was submitted therein, as at a rehearing, the cause being then equally open.⁴⁴ Filing a bill of review does not prevent the execution of the decree impeached.⁴⁵ The court has power, when sustaining such a bill, to set aside a conveyance made in pursuance of the decree.⁴⁶

§ 357. *Bills in the Nature of Bills of Review.* — As has been said above,¹ only parties to the decree impeached or their privies

³⁵ *Buffington v. Harvey*, 95 U. S. 99.

³⁶ *Shelton v. Van Kleeck*, 106 U. S. 532.

³⁷ *Mitford's Pl. ch. 2, § 2, pt. 2.*

³⁸ *Mitford's Pl. ch. 2, § 2, pt. 2.*

³⁹ *Cook v. Bamfield*, 3 Swanst. 607.

⁴⁰ *Mitford's Pl. ch. 2, § 2, pt. 2.*

⁴¹ *Dexter v. Arnold*, 5 Mason, 303;

U. S. v. Sampeyreac, Hempst. 118;
Story's Eq. Pl. § 420, n. 7.

⁴² *Catterall v. Purchase*, 1 Atk. 290.

⁴³ *Whiting v. Bank of the United States*, 13 Pet. 13; *Story's Eq. Pl. § 407.*

⁴⁴ *Catterall v. Purchase*, 1 Atk. 290.

⁴⁵ *Williams v. Mellish*, 1 Vern. 117, n.

⁴⁶ *Bank of the United States v. Ritchie*, 8 Pet. 128.

§ 357. ¹ See § 356.

by operation of law, as heirs, executors, or administrators, are entitled to file a bill of review; but other persons in interest and in priority of estate, who are aggrieved by the decree, can have the same relief by means of a bill in the nature of a bill of review.² Such are assignees, devisees, and remaindermen of the original unsuccessful parties.³ Lord Redesdale also speaks as follows concerning such a bill: "If a decree is made against a person who has no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest, relief may be obtained against error in the decree by a bill in the nature of a bill of review. Thus, if a decree is made against a tenant for life only, a remainderman in tail, or in fee, cannot defeat the proceedings against the tenant for life, but by a bill, showing the error in the decree, the incompetency in the tenant for life to sustain the suit, and the accruer of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and for that purpose that the other party may appear to and answer this new bill, and that the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the court."⁴ Otherwise, the frame of and proceedings under bills in the nature of bills of review are substantially the same as those relating to bills of review.

§ 358. **Bills to impeach Decrees on Account of Fraud.** — "If a decree has been obtained by fraud, it may be impeached by original bill without the leave of the court; the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof before the propriety of the decree can be investigated. And where a decree has been so obtained the court will restore the parties to their former situation, whatever their rights may be."¹ Such a bill has been called an original bill in the nature of a bill of review.² There are dicta stating

² Story's Eq. Pl. § 409.

³ Story's Eq. Pl. § 409; *Whiting v. Bank of the United States*, 13 Pet. 6; *Singleton v. Singleton*, 8 B. Monr. (Ky.) 340; *Turner v. Berry*, 38 Ill. 541.

⁴ Mitford's Pl. ch. 1, § 2, pt. 3.

§ 358. ¹ Mitford's Pl. ch. 1, § 2, pt. 3.

See also Story's Eq. Pl. § 426; *Richmond v. Tayleur*, 1 P. Wms. 734; *Barnesle v. Powell*, 1 Ves. Sen. 120; *Evans v. Bacon*, 90 Mass. 213; *Pacific R. R. of Mo. v. Mo. Pacific Ry. Co.*, 111 United States, 505.

² *Mussel v. Morgan*, 3 Bro. Ch. R. 74, 79; Story's Eq. Pl. § 426.

that a decree obtained by fraud may be set aside upon petition;² but it was finally settled that after enrolment a decree could only be impeached for this account by an original bill.⁴ This is the only manner in which a decree entered by consent can be impeached.⁵ Decrees entered by collusion,⁶ or surprise,⁷ may also be rectified in this manner. Certain other cases, although if logical arrangement solely were considered they should be considered under other heads, yet as they are usually spoken of in this connection by the books, may be here referred to. Lord Redesdale uses the following language, which has been copied by all subsequent text-writers: "Besides cases of direct fraud in obtaining a decree, it seems to have been considered, that where a decree has been made against a trustee, the *cestui que trust* not being before the court and the trust not discovered; or against a person who has made some conveyance or incumbrance not discovered; or when a decree has been made in favor of or against an heir, when the ancestor has in fact disposed by will of the subject-matter of the suit; the concealment of the trust or subsequent conveyance or incumbrance, or will, in these several cases, ought to be treated as a fraud. It has been also said that where an improper decree has been made against an infant, without actual fraud, it ought to be impeached by original bill."⁸

A bill to set aside a decree for fraud must state the decree, and the proceedings which led to it, with the circumstances of fraud on which it is impeached.⁹ All the parties to the original suit or their representatives should be joined as parties to it.¹⁰ A bill to set aside a judgment or decree of a State Court on account of fraud may be filed in a Federal court,¹¹ and if originally filed in a State court, may be removed to a Federal court, when the requisite difference of citizenship exists.¹² A bill to set aside the decree of

² *Sheldon v. Fortescue Aland*, 3 P. Wms. 104, 111; Story's Eq. Pl. § 426.

⁴ *Mussel v. Morgan*, 3 Bro. Ch. R. 74, 79; *Bennett v. Hamill*, 2 Sch. & Lefr. 566, 576; Story's Eq. Pl. § 426.

⁵ *Buck v. Fawcett*, 3 P. Wms. 242; *Davenport v. Stafford*, 8 Beav. 503; *Gilbert v. Endean*, L. R. 9 Ch. D. 259; *Section on Decrees* (4th ed.), 1536.

⁶ *Buck v. Fawcett*, 3 P. Wms. 242; Story's Eq. Pl. §§ 426-428.

⁷ *Stevens v. Guppy*, 1 Turn. & Rus. 178.

⁸ Mitford's Pl. ch. 1, § 2, pt. 3.

⁹ Mitford's Pl. ch. 1, § 2, pt. 3; Story's Eq. Pl. § 476.

¹⁰ *Harwood v. Railroad Co.*, 17 Wall. 78.

¹¹ *Gaines v. Fuentes*, 92 U. S. 10; *Barrow v. Hunten*, 29 U. S. 80; *Johnson v. Waters*, 111 U. S. 640; *Arrowsmith v. Gleason*, 129 U. S. 86, 101. But see *Nougé v. Clapp*, 101 U. S. 551; *Graham v. Boston, H. & E. R. R. Co.*, 118 U. S. 161, 177.

¹² *Marshall v. Holmes*, 141 U. S. 589. See *supra*, § 21.

a Federal court on account of fraud may be filed in a Federal court irrespective of the citizenship of the parties.¹³ A bill defective as a bill to set aside a decree for fraud might perhaps be sustained as a bill of review for matters apparent upon the record, but not unless filed within the time allowed for an appeal.¹⁴ Upon an application for leave to file a bill of review for matters of fact newly discovered which were insufficient to support the bill, the court refused to separate from such allegations other allegations of fraud in obtaining the original decree, and to permit the bill to be filed as a bill to set aside the decree for fraud.¹⁵ A bill to set aside a decree for fraud must show a valid and meritorious defense to the original decree.¹⁶

§ 359. **Bills to Suspend or Avoid the Operation of Decrees and Judgments.**—Lord Redesdale speaks as follows concerning bills to suspend the operation of decrees: “The operation of a decree signed and enrolled has been suspended on special circumstances, or avoided by matter subsequent to the decree, upon a new bill for that purpose. Thus during the troubles after the death of Charles the First, upon a decree for a foreclosure in case of non-payment of principal, interest, and costs due on a mortgage, the mortgagor at the time of payment being forced to leave the kingdom to avoid the consequences of his engagements with the royal party, and having requested the mortgagee to sell the estate to the best advantage and pay himself, which the mortgagee appeared to have acquiesced in; the court upon a new bill enlarged the time for performance of the decree, upon the ground of the inevitable necessity which prevented the mortgagor from complying with the strict terms of it, and also made a new decree on the ground of the matter subsequent to the former decree.”¹ “The embarrassments occasioned by the civil war in the reign of Charles I., and the state of affairs after his death, before the restoration of Charles II., occasioned many extraordinary applications to the court of Chancery for relief, and perhaps induced the court to go far in extending relief; but there were many

¹³ *Pacific R. R. of Mo. v. Mo. Pacific Ry. Co.*, 111 United States 585; *supra*, § 21.

¹⁴ *Dunlevy v. Dunlevy*, 38 Fed. R. 462. See *supra*, § 354.

¹⁵ *Kimberly v. Arms*, 40 Fed. R. 548, 558; s. c. 136 U. S. 629.

¹⁶ *Kimberly v. Arms*, 40 Fed. R. 548; s. c. 136 U. S. 629.

§ 359. ¹ Mitford's Pl. ch. 1, § 2, pt. 3; *Cocker v. Bevis*, 1 Ch. Cas. 61; and also referring to *Venables v. Foyle*, 1 Ch. Cas. 2; *Whorewood v. Whorewood*, 1 Ch. Cas. 250; *Wakelin v. Walthal*, 2 Ch. Cas. 8.

cases of extreme hardship, in which it was deemed impossible, consistently with established principles, to give relief; and all cases determined soon after the restoration, upon circumstances connected with the prior disturbed state of the country, ought to be considered with much caution.”² No instance is known of the maintenance of such a bill in a Federal court. In a few cases the Federal courts have sustained bills to suspend the operation and enjoin the enforcement of judgments at law for matters subsequent.³

² Mitford's Pl. ch. 1, § 2, pt. 3.

Judges, 12 Wheat. 561. See *Ballance v.*

³ *Johnson v. St. Louis, I. M. & S. Ry. Co.*, 141 U. S. 602, 610; *Parker v. The*

Forsyth, 24 How. 183.

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